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CAN INTERNATIONAL LAW HELP RESOLVE THE CONFLICTS OVER UNINHABITED ISLANDS IN THE EAST CHINA SEA?

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I. INTRODUCTION

Former Chinese leader Deng Xiaoping once famously urged that resolution of disputes with China's neighbors over uninhabited islands be put off to a later generation, stating: "Our generation is not wise enough to find common language on this question. The next generation will certainly be wiser."[1] Such sage advice seemed practical at the time, freeing China and its neighbors to focus on more pressing trade and economic development efforts. The wisdom of continuing deferral of the disputes over uninhabited islands is now in doubt, at least when peaceful alternatives may be considered. Beyond the rapid economic development and the consequent explosion of resource demands that has occurred since Deng uttered these words, technological development has made these deep seabed resources more readily accessible.[2] Added to this has been China's rapid economic development and associated military rise, encouraging China's expanded attention to territorial sovereignty and resource claims in its periphery.[3] Increased military confrontations over disputed islands have added to the urgency of this matter, and an impasse has prevailed.[4]

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1. CHIEN-PENG CHUNG, DOMESTIC POLITICS, INTERNATIONAL BARGAINING AND CHINA'S TERRITORIAL DISPUTES 38 (2004); *see also* CHI-KIN LO, CHINA'S POLICY TOWARD TERRITORIAL DISPUTES: THE CASE OF THE SOUTH CHINA SEA ISLANDS 171 (2003).

2. U.S. ENERGY INFO. ADMIN., EAST CHINA SEA 1 (Sept. 17, 2014), *available at* http://www.eia.gov/countries/analysisbriefs/east_china_sea/east_china_sea.pdf (stating although the East China Sea may have abundant oil and natural gas resources, unresolved territorial disputes continue to hinder exploration and development in the area); Michael T. Klare, *Island Grabbing in Asia: Why the South China Seas are So Tense*, FOREIGN AFF. (Sept. 4, 2012), http://www.foreignaffairs.com/articles/138093/michael-t-klare/island-grabbing-in-asia.

3. *Asia's Balance of Power: China's Military Rise*, ECONOMIST, Apr. 7, 2012, http://www.economist.com/node/21552212; Toshi Yoshihara, *War By Other Means: China's Political Uses of Seapower*, DIPLOMAT (Sept. 26, 2012), http://thediplomat.com/2012/09/26/war-by-other-means-chinas-political-uses-of-seapower; Kurt Campbell, *Trouble at Sea Reveals the New Shape of China's Foreign Policy*, FIN. TIMES, July 22, 2014, http://blogs.ft.com/the-a-list/2014/07/22/trouble-at-sea-reveals-the-new-shape-of-chinas-foreign-policy.

4. *Japan Defense Paper Warns of China's 'Dangerous Acts' in Sea, Air*, TIMES INDIA, Aug. 5, 2014, http://timesofindia.indiatimes.com/world/rest-of-world/Japan-defence-paper-warns-over-Chinas-dangerous-acts-in-sea-air/articleshow/39663923.cms; *Chinese Ships Advance in Waters Near Diaoyus Defying Japan's White Paper Warning*, S. CHINA MORNING POST, Aug. 6, 2014, 2:03 PM, http://www.scmp.com/news/asia/article/1567585/defying-japans-warning-chinese-ships-advance-waters-near-diaoyus.

This article focuses on comparable disputes over two groups of uninhabited islands—the Dokdo (Takeshima in Japanese) Islands and the Diaoyu (Senkaku in Japanese) Islands—that may be pivotal to unraveling a series of volatile maritime disputes between Japan and South Korea, on the one hand, and Japan and China, on the other. The Dokdo/Takeshima and Senkaku/Diaoyu Islands are located respectively in the Sea of Japan (known as the East Sea in Korea) and the East China Sea. This narrowing of the topic to these two particular island disputes and related maritime issues is offered in the hope that these two sets of disputes may hold some keys to the wider, more factually complex debate stretching across the region, both north to the Yellow Sea and south to the South China Sea.[5] At the same time, there is hope the Japan-South Korea dispute may inform options available for the China-Japan dispute.

In the face of the current impasse, the challenge is to identify those aspects of these island disputes that can be solved so as to ultimately facilitate more comprehensive maritime solutions that may be achieved under the United Nations Convention on the Law of the Sea ("UNCLOS").[6] Toward this end, the following six sections will discuss: first, the posture of the current disputes; second, some international legal principles of relevance to the parties positions regarding territorial claims to uninhabited islands and resource rights in adjoining seas; third, the above-noted Japanese-South Korean dispute relating to the Dokdo/Takeshima Islands; fourth, the Sino-Japanese dispute over the Senkaku/Diaoyu Islands; fifth, the parties' positions regarding the related resource boundary claims; and, sixth, concluding recommendations on how best to move past the current impasse. Paradoxically, while resource concerns triggered a lot of the recent attention to these disputes, nationalistic concerns over sovereignty engender more passion in the disputants. The twin concern over sovereignty and resources has become an increasing cause of conflict in the Asian region, making settlement of resource claims without addressing the underlying sovereignty dispute increasingly difficult.

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5. *See generally* Andy Yee, *Maritime Territorial Disputes in East Asia: A Comparative Analysis of the South China Sea and the East China Sea*, 2 J. CURRENT CHINESE AFF. 165 (2011). Both Japan and South Korea have other sea resource boundary disputes with China. *See e.g.*, Euan Graham, *South Korea's Maritime Challenges: Between a Rock and a Hard Base*, RSIS COMMENTARIES, No. 063/2012, Apr. 11, 2012, *available at* http://www.rsis.edu.sg/wp-content/uploads/2014/07/CO12063.pdf. The Sino-Korean dispute over Leo Island (actually submerged rocks) has been especially contentious. Terence Roehrig, *South Korea-China Maritime Disputes: Toward a Solution*, EASTASIAFORUM.ORG, Nov. 27, 2012, http://www.eastasiaforum.org/2012/11/27/south-korea-china-maritime-disputes-toward-a-solution; *China Must Not Take Its Territorial Ambitions Too Far*, CHOSUN ILBO, Sept. 26, 2012, http://english.chosun.com/site/data/html_dir/2012/09/26/2012092601283.html; *Scores of Chinese Fishing Boats Invade Korean Waters*, CHOSUN ILBO, May 2, 2014,http://english.chosun.com/site/data/html_dir/2014/05/02/2014050201344.html. Less relevant to the present discussion are Japanese disputes with Russia over its northern Kuril Islands. *Japan PM, Putin Seek Progress on Islands Dispute*, ABC NEWS AUSTL., Apr. 29, 2013, http://www.abc.net.au/news/2013-04-29/an-japan2c-russia-discuss-islands-dispute/4658814.

6. *See generally* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS].

With this in mind, the final section offers a recommendation that reverses both Deng Xiaoping's earlier sage advice and the favored international practice under UNCLOS of interim resource settlements in the face of intractable territorial disputes. Developing international customary law regarding claims to uninhabited islands suggests the most effective avenue to unraveling these territorial and maritime resource disputes is to first pay attention to peaceful resolution of the island and related maritime sovereignty disputes. In the spirit of the gentle removal of logs from the log-jam that characterizes these disputes, this effort might ideally begin with third-party dispute resolution, preferably in the International Court of Justice ("ICJ").

Careful consideration of the security and other alliances between South Korea and Japan, as they react to China's rise and North Korea's aggression, may encourage a process to resolve historical tensions and begin to outline relative rights respecting these islands and the broader maritime claims. Beyond such optimal approach, other lesser alternatives are also considered. These recommendations recognize attempts to fully resolve the maritime resource disputes have been held up for decades. Uncertainty over the islands' claims and associated resource zones has spawned the back and forth posturing that inhibits compromise over the maritime resource claims. The goal is to move the process forward toward a solution before the more aggravated military conflict, which many fear, ensues.

II. THE CURRENT POSTURE OF THE DISPUTES

A. Tit-for-Tat Provocations

The past couple of years have witnessed an explosion of confrontations relating to sovereignty and jurisdiction over uninhabited islands and maritime resource zones in the East and Southeast Asian maritime areas. The long list of confrontations between the parties to the present discussion have included: the Sino-Japanese dispute in late 2010 over the Japanese arrest of Chinese fishermen accused of ramming a Japanese patrol boat near the Japanese-administered Senkaku/Diaoyu Islands in the East China Sea;[7] the 2012 Japanese arrest and quick release of fourteen Chinese civilians attempting to occupy Diaoyu/Senkaku, with follow-on Japanese civilian occupation;[8] the September 2012 Japanese purchase of the Diaoyu/Senkaku Islands from a private Japanese holder (characterized by China as "nationalization"), which netted the largest anti-Japanese riots in China in decades;[9] Chinese patrol boats frequently confronting the Japanese Coast Guard

7. *Japan-China Row over Ship Seizure*, ALJAZEERA (Sept. 9, 2010, 9:48 AM), http://www.aljazeera.com/news/asia-pacific/2010/09/201099636305046 49.html.

8. Martin Fackler, *Japan Holds 14 Chinese in Island Landing*, N.Y. TIMES, Aug. 15, 2012, http://www.nytimes.com/2012/08/16/world/asia/japanese-ministers-visit-tokyo-shrine.html?_r=0.

9. The Chinese government appears to manage the public discontent over Japan's purchase, first turning it on and then turning it off, perhaps fearing a backlash against their own government. Keith Bradsher, Martin Fackler, & Andrew Jacobs, *Anti-Japan Protests Erupt in China over Disputed Island*, N.Y. TIMES, Aug. 19, 2012, http://www.nytimes.com/2012/08/20/world/asia/japanese-activists-display-

off Diaoyu/Senkaku;[10] various threats of sanctions (under WTO "security exceptions") or even war in the Chinese official press;[11] Japan's scrambling of fighter planes in response to Chinese warplanes flying near the Senkaku/Diaoyu Islands.[12]

That there has been a similar list of disputes in the South China Sea signals that the reach of this tense situation goes well beyond the immediate area to include: maritime patrol boat confrontations between China and its neighbors over the Spratly and Paracel Islands in the South China Sea;[13] disputes in 2014 over a Chinese drilling platform operating in waters generally thought to be in the Vietnamese Exclusive Economic Zone ("EEZ"), netting confrontations at sea and large Vietnamese street protest;[14] a dispute and then a now-failed compromise between the Philippines and China over Scarborough Shoal and China's building of man-made islands on reefs in the disputed Spratly Islands.[15] While the present essay will discuss prominent East China Sea disputes, those in the South China Sea are equally compelling.

Any of these disputes risk conflagration across the region as various security alignments are brought into play. Recent developments, with China employing

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flag-on-disputed-island.html?hp (noting the demonstrations appeared sanctioned and chaperoned by police). While Beijing accuses Japan of provoking China by nationalizing the Senkaku/Diaoyu islands, it appears the Japanese purchase from private owners was designed to avoid a purchase being orchestrated by the more nationalistic Tokyo governor. Mari Yamaguchi, *Tokyo Governor Says City will Buy Disputed Islands*, ASSOCIATED PRESS, Apr. 17, 2012, http://finance.yahoo.com/news/tokyo-governor-says-city-buy-150303483.html. *See also* Ed Zhang, *China Lays into Japan over Naming of Islets*, S. CHINA MORNING POST (Jan. 31, 2012, 12:00 AM), http://www.scmp.com/article/991303/china-lays-japan-over-naming-islets.

10. Minnie Chan, *PLA Puts Military Heat on Japan over Diaoyu Islands*, S. CHINA MORNING POST (Sept. 12, 2012, 7:11 PM), http://www.scmp.com/news/china/article/1035320/pla-puts-military-heat-japan-over-diaoyu-islands.

11. Jin Baisong, *Consider Sanctions on Japan*, CHINA DAILY, Sept. 17, 2012, 7:53 AM), http://www.chinadaily.com.cn/opinion/2012-09/17/content_15761435.htm (indicating a military response should be a last choice); Jane Perlez, *China Alters Its Strategy in Diplomatic Crisis with Japan*, N.Y. TIMES, Sept. 28, 2012, http://www.nytimes.com/2012/09/29/world/asia/china-alters-its-strategy-in-dispute-with-japan.html?pagewanted=all&_r=0.

12. Julian Ryall, *Japanese Jets Ordered to Diaoyus 160 Times in Nine Months*, S. CHINA MORNING POST, Jan. 26, 2013, 6:10 PM, http://www.scmp.com/news/china/article/1136249/japanese-jets-ordered-diaoyus-160-times-nine-months.

13. Ian Storey, *ASEAN and the South China Sea: Movement in Lieu of Progress*, CHINA BRIEF, Apr. 26, 2012, at 10, *available at* http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=39305&tx_ttnews%5BbackPid%5D=589&no_cache=1#.VFrdufnF_Xt.

14. Edward Wong, *Analysts Say China May Try to Use Manmade Islands to Bolster Bid for Economic Development*, N.Y. TIMES, June 19, 2014, http://sinosphere.blogs.nytimes.com/2014/06/19/analysts-say-china-may-try-to-use-manmade-islands-to-bolster-bid-for-economic-development/; NGUYEN THI LAN ANH, XISHA (PARACEL) ISLANDS: A REJOINDER (2014), *available at* http://www.rsis.edu.sg/wp-content/uploads/2014/07/CO14117.pdf.

15. Kristine Kwok & Minnie Chan, *China Plans Artificial Island in Disputed Spratlys Chain in South China Sea*, S. CHINA MORNING POST, June 7, 2014, http://www.scmp.com/news/china/article/1527059/china-plans-artificial-island-disputed-spratlys-chain-south-china-sea?page=all.

drones near the Diaoyu/Senkaku Islands and declaring an Air Defense Identification Zone ("ADIZ") to overlap the Japanese controlled islands, have raised ominous concerns about miscalculations leading to military conflict.[16] Chinese officials and commentators have invoked World War II history to suggest a rising tide of Japanese militarism.[17] The perceived threat from a now rising China may appear more imminent to its neighbors.

A common thread in many of these disputes is China's military rise and consequent assertiveness.[18] There have been threatening domestic calls for China to enhance its sea power in order to deal more forcefully with these challenges.[19] These have included what has been called a "near sea doctrine" China announced five years ago, where China declared an aim to exercise greater control over the East and South China Seas.[20] There have in fact been several incursions by

16. Christopher Bodeen, *China Warns Foreign Planes Entering Defense Zone*, ASSOCIATED PRESS, Jan. 24, 2014, http://news.yahoo.com/china-warns-foreign-planes-entering-defense-zone-064540562.html; Wendell Minnick, *Fact Sheet: China's Air Defense Zone*, DEFENSE NEWS, Nov. 2, 2013, http://www.defensenews.com/article/20131124/DEFREG03/311240004/Fact-Sheet-China-s-Air-Defense-Zone; *US Criticizes New China Zone, Vows to Defend Japan*, SPACEWAR.COM, Nov. 23, 2013, http://www.spacewar.com/reports/US_criticizes_new_China_zone_vows_to_defend_Japan_999.html; Press Release, Ministry of Nat'l Def., PRC, Defense Spokesman Yang Yujun's Response to Questions on the Establishment of the East China Sea Air Defense Identification Zone (Nov. 23, 2013), *available at* http://eng.mod.gov.cn/TopNews/2013-11/23/content_4476149.htm; Chris Buckley, *China Claims Air Rights over Disputed Islands*, N.Y. TIMES, Nov. 23, 2013, http://www.nytimes.com/2013/11/24/world/asia/china-warns-of-action-against-aircraft-over-disputed-seas.html?_r=0; *Former Chinese Commander Warns of War If Japan Shoots Down Drone*, BLOOMBERG News, Nov. 4, 2013, http://www.bloomberg.com/news/2013-11-04/former-chinese-commander-warns-of-war-if-japan-shoots-down-drone.html; Martin Fackler, *Japan Rejects China's Claim to Air Rights Over Islands*, N.Y. TIMES, Nov. 24, 2013, http://www.nytimes.com/2013/11/25/world/asia/japan-rejects-chinas-claim-to-air-rights-over-disputed-islands.html?ref=international-home; Ely Ratner, *China Undeterred and Unapologetic*, WARONTHEROCKS.COM, June 24, 2014, http://warontherocks.com/2014/06/china-undeterred-and-unapologetic/.

17. Zhang Junsai, *Abe's Militarism Defies History*, GLOBE AND MAIL, Jan. 9, 2014, http://www.theglobeandmail.com/globe-debate/abes-militarism-defies-history/article16244968/.

18. Edward Wong, *China Navy Reaches Far, Unsettling the Region*, N.Y. TIMES, June 15, 2011, http://www.nytimes.com/2011/06/15/world/asia/15china.html?_r=0; *Asia's Balance of Power*, *supra* note 3; *China's Maritime Ambitions Making Waves in Pacific*, PHIL. DAILY INQUIRER, Aug. 10, 2013, 3:35 AM, http://globalnation.inquirer.net/82919/chinas-maritime-ambitions-making-waves-in-pacific-2/. China's inclusion of the islands among its "core interest" has also caused unease. *China Officially Labels Senkakus a 'Core Interest'*, JAPAN TIMES, Apr. 27, 2013, http://www.japantimes.co.jp/news/2013/04/27/national/china-officially-labels-senkakus-a-core-interest/#.VF0B3_nF_Vo; *Senkakus a 'Core Interest,' Chinese Military Scholar Tells Japan*, JAPAN TIMES, Aug. 20, 2013, http://www.japantimes.co.jp/news/2013/08/20/national/politics-diplomacy/senkakus-a-core-interest-chinese-military-scholar-tells-japan/#.VF0EO_nF_Vp; Phillip C. Saunders, *China's Juggling Act: Balancing Stability and Territorial Claims*, PACNET No. 33 (Center for Strategic & Int'l Studies), Apr. 29, 2014, at 1, *available at* http://csis.org/files/publication/Pac1433.pdf.

19. Hao Zhou, *China Yet to be a Sea Power*, GLOBALTIMES.CN, Mar. 23, 2012, http://www.globaltimes.cn/content/701700.shtml.

20. Michael J. Green, *Negotiating Asia's Troubled Waters*, N.Y. TIMES, Apr. 23, 2013, http://www.nytimes.com/2014/04/24/opinion/negotiating-asias-troubled-waters.html?_r=0.

Chinese Coast Guard, marine surveillance ships, and aircrafts near these islands and others in the South China Sea.[21] A prominent Japanese retired admiral has even argued, beyond seabed resource claims, China's real goal in seeking to control the Senkaku/Diaoyu Islands and the South China Sea is to create a submarine safe-zone in the South China Sea to enhance unfettered access to the open ocean by nuclear submarines, as a deterrent against the U.S.[22] Others take the view that China is simply in a renewal phase aimed at expanding its sovereign territory and resurrecting its more glorious past.[23] Whichever theory is correct, China's military posturing raises risks both for the disputants and for U.S. involvement.[24] Concerns about full civilian control of China's military have enhanced the perceived sense of risk in military encounters at sea.[25] Diplomatic efforts to contain this risk have born very little fruit.[26]

These risks have also produced escalation on the Japanese side. After years of somewhat stagnant military budgets, Japan has announced defense budget increases and strategic shifts to counter Chinese incursions.[27] It has revised its

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21. *China's New Coastguard Flexes Muscles near Diaoyu Islands*, S. CHINA MORNING POST, July 26, 2013, http://www.scmp.com/news/china/article/1291292/chinese-coastguard-enters-japanese-controlled-waters-raising-tensions; *Three Chinese Vessels Enter Territorial Waters Near Senkakus*, JAPAN TIMES, Feb. 28, 2013, http://www.japantimes.co.jp/news/2013/02/28/national/three-chinese-vessels-enter-territorial-waters-near-senkakus/#.VF0fUPnF_Vo; Barbara Demick, *China Wages Stealth War in Asian Waters*, L.A. TIMES, Mar. 27, 2013, http://articles.latimes.com/2013/mar/27/world/la-fg-china-maritime-20130327; *Japan PM Abe Warns China of Force Over Islands Landing*, BBC NEWS, Apr. 23, 2013, http://www.bbc.com/news/world-asia-22260140.

22. Reiji Yoshida, *Beijing's Senkaku Goal: Sub 'Safe Haven' in South China Sea*, JAPAN TIMES, Nov. 7, 2012, http://www.japantimes.co.jp/news/2012/11/07/national/beijings-senkaku-goal-sub-safe-haven-in-south-china-sea/.

23. John Lee, *China's Dream of Rebirth*, S. CHINA MORNING POST, Mar. 2, 2013, http://www.scmp.com/comment/insight-opinion/article/1166737/chinas-dream-rebirth?page=all; Holly Morrow, *It's Not About the Oil—It's About the Tiny Rocks*, FOREIGN POL'Y, Aug. 4, 2014, http://www.foreignpolicy.com/articles/2014/08/04/it_s_not_about_the_oil_it_s_about_the_tiny_rocks_china_south_china_sea_japan_vietnam (arguing that these disputes are not about oil but are primarily about sovereignty).

24. John Pomfret, *Japan and China's Island Argument is a U.S. Concern*, WASH. POST, Feb. 5, 2013, http://www.washingtonpost.com/opinions/japan-and-chinas-island-argument-is-a-us-concern/2013/02/05/fbc7ed62-6999-11e2-af53-7b2b2a7510a8_story.html; *U.S. Airs Concern over China's Radar Locking on Japanese Defense Ship*, ASIA NEWS MONITOR, Feb. 7, 2013; *Insight: China Increased Belligerence after U.S. Aircraft Deployment near Senkakus*, ASAHI SHIMBUN, Feb. 6, 2013, http://ajw.asahi.com/article/asia/AJ201302060077.

25. Masahiro Matsumura, *Praetorian China?*, PROJECT-SYNDICATE.ORG (Apr. 26, 2013), http://www.project-syndicate.org/commentary/china-s-loss-of-civilian-control-over-the-military-by-masahiro-matsumura.

26. *Showing Off to the World*, ECONOMIST, Nov. 8, 2014, http://www.economist.com/news/china/21631107-capital-about-host-president-xi-jinpings-diplomatic-coming-out-party-showing.

27. Yuka Hayashi, *Japanese General Seeks to Reinforce Defenses*, WALL ST. J., Jan. 14, 2013, http://online.wsj.com/articles/SB10001424127887324581504578238473997165346; *see generally* JAPAN MINISTRY OF DEFENSE, DEFENSE OF JAPAN 2013 (2013), *available at* http://www.mod.go.jp/e/publ/w_paper/2013.html) (reflecting a shift in defense interest from the North to the islands in the Southwest).

defense strategy to focus its forces more to the south to defend against potential Chinese attacks on its islands.[28] Japan has also stepped up efforts to develop a stealth fighter jet to match the J-20 stealth fighter recently tested by China.[29] Japan has engaged in war games and placed missiles on nearby Pacific gateway islands.[30] It has also attempted to contain the problem by reaching a separate agreement with the Republic of China ("ROC") to allow Taiwanese fishermen to fish near the Senkaku/Diaoyu Islands just beyond the twelve-mile territorial sea boundary.[31]

Some disputants have lodged formal protests or other submissions to the United Nations. In Southeast Asia, these complaints relate to China's allegedly excessive resource claims and the so-called "nine dotted lines" claim to most of the South China Sea.[32] China has reacted to the most aggressive of these, relating to the filing by the Philippines, by refusing to participate and put forth its own arbitrator, requiring the President of the U.N. Tribunal to select a judge on behalf of China.[33] After the 2012 Diaoyu/Senkaku crises, China instituted its own filing

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28. *See* Hayashi, *supra* note 27.

29. David Axe, *Japan's Stealth Fighter Gambit*, DIPLOMAT, June 23, 2011, http://thediplomat.com/2011/06/japans-stealth-fighter-gambit/?allpages=yes.

30. *Japan putting Missiles on Pacific Gateway Islands*, CHANNELNEWSASIA.COM, Nov. 7, 2013, http://www.channelnewsasia.com/news/specialreports/mh370/news/japan-putting-missiles-on/878190.html.

31. *China Angered as Japan, Taiwan Sign Fishing Agreement*, REUTERS, Apr. 10, 2013, http://www.reuters.com/article/2013/04/10/us-china-japan-taiwan-idUSBRE93909520130410; Minnie Chan, *Taiwan Would 'Expel' Mainland Trawlers under Japan Fishing Deal*, S. CHINA MORNING POST, Apr. 10, 2013, http://www.scmp.com/news/china/article/1211568/china-angered-japan-taiwan-sign-fishing-agreement?page=all.

32. Though China has formally opted out of compulsory jurisdiction for maritime boundaries and military activities, as permitted under UNCLOS, the Philippines has filed a claim under UNCLOS to Scarborough Shoal (known as Huangyan Island in China). *China Rejects Manila Claims over South China Shoal*, ASSOCIATED PRESS, Apr. 18, 2012, http://seattletimes.com/html/nationworld/2018004165_apassouthchinasea.html. Beyond these island disputes there are numerous issues related to China's hotly disputed claims to nearly all of the South China Seas within the infamous "nine dotted lines", which Wang Gungwu traces to China's attempted accession of Japanese imperial claims following World War II. Wang Gungwu, *China and the Map of Nine Dotted Lines*, STRAITS TIMES, July 11, 2012, http://www.straitstimes.com/the-big-story/asia-report/china/story/china-and-the-map-nine-dotted-lines-20120711.

33. Greg Torode, *For South China Sea Claimants, a Legal Venue to Battle China*, REUTERS, Feb. 12, 2014, http://www.reuters.com/article/2014/02/13/us-china-vietnam-idUSBREA1C04R20140213. The arbitration judicial panel was fully constituted on April 24, 2013, to include judges from Sri Lanka (president), France, Germany, Netherlands, and Poland. *See* Greg Torode, *Manila to Tackle Sea Row 'With or Without China' at UN*, S. CHINA MORNING POST, Feb. 21, 2013, http://www.scmp.com/news/asia/article/1154951/manila-tackle-sea-row-or-without-china-un; Verna Yu, *Beijing Looks Like A 'Bully' By Refusing Arbitration of South China Sea*, S. CHINA MORNING POST, May 25, 2013, http://www.scmp.com/news/china/article/1245471/beijing-looks-bully-rejecting-arbitration-south-china-sea-issue; Raissa Robles, *Philippines Seeks UN arbitration over South China Sea Disputes*, S. CHINA MORNING POST, May 11, 2013, http://www.scmp.com/news/asia/article/1234952/philippines-seeks-un-arbitration-over-south-china-sea-disputes. The arbitration is expected to take several years, leaving further opportunity to attempt settlement. China has refused to appear, though the tribunal is going forward. *Beijing Rejects Tribunal Request for Plea Response*, TAIPEI TIMES, June 5, 2014, http://www.taipeitimes.com/News/front/archives/2014/06/05/2003592024. Though not formally

with the U.N., indicating its base points and strait baselines to claim territorial seas and possibly associated resource zones for the disputed islands.[34] China has since proclaimed its intention to patrol claimed areas now under the administration of other states.[35] Such Chinese proclamations have included reported regulations on vessels in China's territorial seas, issued by the responsible Hainan People's Congress.[36] It has been argued that enforcement of such regulations through seizure of a foreign vessel may open China up to the compulsory jurisdiction of the International Tribunal of the Law of the Sea ("ITLOS"), which has disavowed jurisdiction in maritime delimitation disputes.[37] These official Chinese actions, in conjunction with official encouragement of anti-Japanese demonstrations, not to mention encouragement for Chinese fishing and patrol vessels to enter the disputed areas, surely contribute to a volatile situation.[38]

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appearing, China did publish a position paper objecting to jurisdiction in the dispute on December 7, 2014. POSITION PAPER OF THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA ON THE MATTER OF JURISDICTION IN THE SOUTH CHINA SEA ARBITRATION INITIATED BY THE REPUBLIC OF THE PHILIPPINES (2014), *available at* http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

34. GOVERNMENT OF THE PRC, GOVERNMENT SUBMISSION TO THE U.N., *Statement of the Government of the PRC on the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands* (Sept. 10, 2012), *available at* http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn_mzn89_2012_e.pdf; *China's Statement over Diaoyu Islands*, PEOPLE'S DAILY, Sept. 11, 2012, http://english.people.com.cn/90883/7943813.html; Continental Shelf Notification, U.N. DOALOS, Receipt of the Submission Made by the People's Republic of China to the Commission on the Limits of the Continental Shelf, CLCS.63.2012LOS (Dec. 14, 2012), *available at* http://www.un.org/depts/los/clcs_new/submissions_files/chn63_12/clcs_63_2012.pdf. Base lines refer to the inland boundary of the territorial sea from which all other zones are measured; when coast are uneven or for islands strait baselines may be used under certain conditions. *See* J. Ashley Roach, *China's Straight Baseline Claim: Senkaku (Diaoyu) Islands*, 17 AM. SOC'Y INT'L L. 1 (2013), *available at* http://www.asil.org/insights/volume/17/issue/7/china%E2%80%99s-straight-baseline-claim-senkaku-diaoyu-islands. UNCLOS Article 5 provides, "except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." UNCLOS Article 7 allows for strait baselines, (1) "in localities where the coastline is deeply indented and cut into," and (2) "if there is a fringe of islands along the coast in its immediate vicinity." UNCLOS Article 46 allows strait baselines for archipelagic states to outer most islands.

35. Stephanie Kleine-Ahlbrandt, *Dangerous Waters, Why China's Dispute with Japan is More Dangerous than You Think*, FOREIGN POL'Y, Sept. 17, 2012, http://www.foreignpolicy.com/articles/2012/09/17/dangerous_waters.

36. *See, e.g.*, H.R. Res. 776, 113th Cong. §2(27) (2013).

37. Ben Blanchard & Manuel Mogato, *Chinese Police Plan to Board Vessels in Disputed Seas*, REUTERS, Nov. 29, 2012, http://www.reuters.com/article/2012/11/29/us-china-seas-idUSBRE8AS05E20121129. Sam Bateman argues that although China has opted out of compulsory jurisdiction for maritime delimitation, it seizure of a vessel in contested waters claimed as territorial waters in a seizure dispute could open the door to the boundary delimitation issues necessary to determine the appropriateness of the seizure. Sam Bateman, *China's New Maritime Regulations: Do They Accord with International Law?*, RSIS COMMENTARIES, No. 220/2012, Dec. 5, 2012, *available at* http://www.rsis.edu.sg/wp-content/uploads/2014/07/CO12220.pdf.

38. Minnie Chan, *China Vows to Protect 2,000 Fishing Boats Heading Towards Diaoyus*, S. CHINA MORNING POST, Sept. 18, 2012, http://www.scmp.com/news/china/article/1039353/china-vows-

The discussion of these maritime disputes in several international forums signals enhanced likelihood of further confrontation. Discussions at the March 2012 meeting of China's National People's Congress tended to show China's determination to press its maritime claims with even greater determination.[39] As President Obama restated in Tokyo in April 2014, the U.S. is committed to defend Diaoyu/Senkaku under the U.S.-Japan Treaty of Mutual Cooperation and Security.[40] This frequently stated commitment, endorsed by congressional resolution in late 2012, no doubt contributes to the military risk associated with this issue.[41] Japan's hedging against China's volatile threats also includes increased security alignments with other threatened states.[42] While there have

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protect-2000-fishing-boats-heading-towards-diaoyus. There has generally been less agitation on the Japanese side. Julian Ryall, *Japanese Unmoved by Diaoyus Row*, S. CHINA MORNING POST, Sept. 18, 2012, http://www.scmp.com/news/china/article/1039350/japanese-unmoved-diaoyus-row?page=all. That Beijing frequently employs a people's war strategy of using ostensibly private fishing boats for quasi-military purposes as "fisheries patrols" off Senkaku/Diaoyu poses a particular risk of military confrontation. Will Clem, *Use Fisheries Patrols to Tighten Grip on Diaoyus, Official Says*, S. CHINA MORNING POST, Dec. 7, 2010, http://www.scmp.com/article/732654/use-fisheries-patrols-tighten-grip-diaoyus-official-says; Mark McDonald, *Will China Arm its Fishermen to Protect a 'Core Interest'?*, N.Y. TIMES, Sept. 12, 2012, http://rendezvous.blogs.nytimes.com/2012/09/12/will-china-arm-its-fishermen-to-protect-a-core-interest/?_r=0. Beyond military tensions there have even been civilian boycotts of Japanese goods. Ben Blanchard & Xiaoyi Shao, *China Says Tensions with Japan Likely to Hurt Trade*, REUTERS, Sept. 13, 2012, http://www.reuters.com/article/2012/09/13/us-china-japan-idUSBRE88C04620120913; Edward Wong, *China's Hard Line: 'No Room for Compromise'*, N.Y. TIMES, Mar. 8, 2014, http://www.nytimes.com/2014/03/09/world/asia/china.html.

39. Li Mingjiang, *China's Rising Maritime Aspirations: Impact on Beijing's Good-Neighbour Policy*, RSIS COMMENTARIES, No. 053/2012, Mar. 28, 2012, *available at* http://www.rsis.edu.sg/wp-content/uploads/2014/07/CO12053.pdf.

40. Kristine Kwok, *Obama Reassures Japan over Diaoyu Islands, but Warns Against Provoking China*, S. CHINA MORNING POST, Apr. 24, 2014, http://www.scmp.com/news/asia/article/1496261/obama-reassures-japan-over-islands-warns-against-provoking-china?page=all.

41. HITOSHI TANAKA, POLITICIZING THE SENKAKU ISLANDS: A DANGER TO REGIONAL STABILITY 2 (2012), *available at* http://www.jcie.org/researchpdfs/EAI/7-3.pdf. This defense treaty coverage was emphasized again in early 2013. Atsushi Matsuura, *Clinton Sends Warning to China over Senkakus*, YOMIURI SHIMBUN (Jan. 21, 2013, 5:51 PM), http://www.4thmedia.org/2013/01/china-strongly-challenges-us-comments-about-the-diaoyu-islands/. That the U.S. has also recently committed to increased missile defense for Japan and to deploy drones over the Diaoyu/Senkaku islands increases the military significance of these commitments. Thom Shanker & Ian Johnson, *US Accord with Japan over Missile Defense Draws Criticism in China*, N.Y. TIMES, Sept. 17, 2012, http://www.nytimes.com/2012/09/18/world/asia/u-s-and-japan-agree-on-missile-defense-system.html?ref=global-home. J. Michael Cole, *US to Deploy Drones over Diaoyutais*, TAIPEI TIMES, Aug. 8, 2012, http://www.taipeitimes.com/News/front/archives/2012/08/08/2003539722; *US Backing May Prove Costly for Japan*, GLOBAL TIMES, Sept. 16, 2012, http://www.globaltimes.cn/content/733451.shtml.

42. *Japan, Vietnam to Deepen Security Ties Amid China's Growing Assertiveness*, MAINICHI, Jan. 18, 2013, https://web.archive.org/web/20130120053829/http:/mainichi.jp/english/english/newsselect/news/20130117p2g00m0dm024000c.html; Isamu Nikaido & Shinichi Sekine, *Abe to Strengthen ASEAN Ties to Contain China's Maritime Advances*, ASAHI SHIMBUN, Jan. 12, 2013, http://ajw.asahi.com/article/behind_news/politics/AJ201301120042; Robert A. Manning, *Abe's ASEAN*

been calls to prepare for war on both sides, the majority opinion is that China and Japan will not risk an all-out war.[43]

Efforts to contain the dispute have also been evident. In August 2012, the Beijing government asked that the Japanese government follow "three no's": Japanese nationals should not land on the disputed islands, Japan should not develop resources around the island, and Japan should not construct any buildings on the islands.[44] Internet users in China attacked the government for being weak.[45] In late 2013, the Chinese Foreign Minister, Wang Yi, speaking before the U.N. General Assembly, sought to cool down these intense disputes by re-invoking Deng Xiaoping's famous dictum about the time not now being ripe to address these issues, though he insisted Japan at least acknowledge the dispute.[46] In 2014 Washington, Manila, Beijing, and Tokyo backed a code of conduct to prevent conflict at sea that has tried to reduce the discussed risks by banning radar-locking of weaponry and setting out a reporting mechanism when naval vessels meet unexpectedly in sea lanes.[47]

The danger of Sino-Japanese military miscalculation has, nevertheless, become increasingly evident in the tit-for-tat military moves of both sides. China viewed the Japanese arrest of fishing boat captains in Japanese-claimed waters and the naming of the islands claimed by China as provocative.[48] China has increased official patrols near the Diaoyu/Senkaku Islands, enhancing the risk of confrontation.[49] On two occasions, the Chinese were reported to have locked

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Tour Stresses Regional Tension, GLOBAL TIMES, Jan. 15, 2013, http://www.globaltimes.cn/content/756023.shtml.

43. Trefor Moss, *High-stakes Stand-off Between Japan and China Won't Come to War*, S. CHINA MORNING POST, Jan.17, 2013, http://www.scmp.com/comment/insight-opinion/article/1129510/high-stakes-stand-between-japan-and-china-wont-come-war?page=all; Chi-yuk Choi, *PLA Officials Say Troops are to Prepare for War Amid Territorial Disputes with Japan*, S. CHINA MORNING POST, Jan. 16, 2013, http://www.scmp.com/news/china/article/1128164/pla-officials-say-troops-are-prepare-war-amid-territorial-disputes-japan.

44. *Beijing to Issue "Three Nos" To Japan over Diaoyutais*, WANT CHINA TIMES, Aug. 30, 2012, http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20120830000089&cid=1101.

45. *Id.*

46. Atsushi Okudera, *Chinese Foreign Minister Takes to Japan in U.N. Speech*, ASAHI SHIMBUN, Sept. 28, 2013, http://ajw.asahi.com/article/behind_news/politics/AJ201309280060.

47. Teddy Ng & Julian Ryall, *Beijing Backs Code to Prevent Conflict at Sea Along with US and Japan*, S. CHINA MORNING POST, Apr. 22, 2014, http://www.scmp.com/news/china/article/1494736/china-among-21-nations-back-code-prevent-unintended-conflict-sea.

48. Ed Zhang, *China Lays into Japan Over Naming of Islets*, S. CHINA MORNING POST, Jan. 31, 2012, http://www.scmp.com/article/991303/china-lays-japan-over-naming-islets; Teddy Ng, *New Maritime Clash Threatens Sino-Japan Ties*, S. CHINA MORNING POST, Nov. 8, 2011, http://www.scmp.com/article/984181/new-maritime-clash-threatens-sino-japan-ties; *China's Contradictory Approach to Arrest of Fishermen*, CHOSUN ILBO, Nov. 10, 2011, http://english.chosun.com/site/data/html_dir/2011/11/10/2011111001144.html.

49. Austin Ramzy, *Tensions with Japan Increase as China Sends Patrol Boats to Disputed Islands*, TIME, Sept. 14, 2012, http://world.time.com/2012/09/14/tensions-with-japan-increase-as-china-sends-patrol-boats-to-disputed-islands/.

weapons-guiding radar on Japanese vessels, accompanied by Chinese denials.[50] There have also been reports of China using drones to defend its claims in the East China Sea and reports of China's intentions to increase patrols even further, to which Japan is likewise preparing defensive measures.[51]

What started with the Japanese government reaching agreement with the private Japanese owners to buy and nationalize the islands, to head off plans of Japanese right-wing politicians, garnered a heated Chinese response and has escalated into the central dispute between these two trading partners.[52] The Chinese government hardly appreciated the Japanese official's motive to undermine a purchase by the more right-wing Governor of Tokyo, who would surely have engaged in other provocative acts on the islands.[53] China sometimes characterizes its claims in the South China Sea and the East China Sea as "core national interests," suggesting non-negotiability, which has carried a menacing tone.[54]

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50. Yuka Hayashi, *US Commander Chides China Over Provocative Act*, WALL ST. J., Feb. 16, 2013, http://online.wsj.com/articles/SB10001424127887324432004578305453572408918; Chris Buckley, *China Denies Directing Radar at Japanese Military*, N.Y. TIMES, Feb. 8, 2013, http://www.nytimes.com/2013/02/09/world/asia/china-denies-directing-radar-at-japanese-military.html?_r=0.

51. Stephen Chen, *Liaoning Sends Drones Over East China Sea*, S. CHINA MORNING POST, Nov. 30, 2011, http://www.scmp.com/article/986333/liaoning-sends-drones-over-east-china-sea; Minnie Chan, *Beijing's Patrol Missions Predicted to Rise*, S. CHINA MORNING POST, Mar. 21, 2012, http://www.scmp.com/article/996069/beijing-patrol-missions-predicted-rise; *Defense Ministry Working on Protocol to Shoot Down Encroaching Drones*, ASAHI SHIMBUN, Oct. 2, 2013, http://ajw.asahi.com/article/behind_news/politics/AJ201310020040.Ramzy, *supra* note 49.

52. Raymond Li, *Papers Go Ballistic over Diaoyu Dispute with Japan Islands in a Storm of Rhetoric, with One Daily Suggesting 'Serving Main Course of Nuclear Missiles'*, S. CHINA MORNING POST, Sept. 16, 2012, http://www.scmp.com/comment/insight-opinion/article/1037887/papers-go-ballistic-over-diaoyu-dispute-japan (China proclaiming the sale illegal and invalid); Shi Jingtao, *Hu Warns Japan over Planned Purchase of Diaoyu Islands*, S. CHINA MORNING POST, Sept. 10, 2012, http://www.scmp.com/news/china/article/1033054/hu-warns-japan-over-planned-purchase-diaoyu-islands; Mure Dickie & Kathrin Hille, *Japan Risks China's Wrath over Senkakus*, FIN. TIMES, Sept. 10, 2012, *available at* http://www.ft.com/cms/s/0/babbfa2a-fb2b-11e1-87ae-00144feabdc0.html.

53. Malcolm Foster, *Tokyo Governor Says City Plans to Buy Disputed East China Sea Islands*, ASSOCIATED PRESS, Apr. 17, 2012, *available at* http://bigstory.ap.org/article/media-japan-govt-agrees-buy-disputed-islands. There have been reports that Japan had quietly notified China and tried to reach an understanding as to the need for this purchase, but ultimately to no avail. *Japan, China Were Close to Preventing Current Turmoil Over Senkaku*, ASAHI SHIMBUN, Oct. 22, 2013, http://ajw.asahi.com/article/behind_news/politics/AJ201310220059.

54. Chinese General Luo Yuan said, "Core interests are not for debate, not for negotiation, and not for trade off." This may say more about China efforts to aggressively assert its claims than reality since the Chinese have frequently negotiated over core interest issues such as Taiwan and Hong Kong. Ed Zhang, *A Hawkish General with a Dove's Heart and Mind*, S. CHINA MORNING POST, Mar. 16, 2011, http://www.scmp.com/article/741066/hawkish-general-doves-heart-and-mind; *China Officially Labels Senkakus a Core Interest*, JAPAN TIMES, Jan. 22, 2012, http://www.japantimes.co.jp/news/2013/04/27/national/china-officially-labels-senkakus-a-core-interest/#.VF6k1PTF8QQ; Cary Huang, *A Bolder China Asserts 'Core Interests' –But Will It Act?*, S. CHINA MORNING POST, Aug. 12, 2010, http://www.scmp.com/article/721928/bolder-china-asserts-core-interests-will-it-act; Lanxin Xiang, *Stumbling Block*, S. CHINA MORNING POST, Nov. 26, 2010, http://www.scmp.com/article/731654/stumbling-block.

While the Japanese dispute with South Korea over Dokdo/Takashima has been comparably less volatile, there have been tense moments and concern about Japan-Korean defense alignments. While Japan is in possession of Senkaku/Diaoyu, South Korea is in possession of Dokdo/Takeshima.[55] The Japanese Government took a dim view of the South Korean President paying a personal visit to Dokdo/Takeshima.[56] These South Korean initiatives have seemingly encouraged China to seek alignment with South Korea against Japan.[57]

These disputes have also reached beyond the immediate disputants, affecting the security posture throughout the region. The U.S. defense obligations towards Japan and South Korea along with tit-for-tat confrontations with China over U.S. warship passage through these seas have raised the temperature.[58] Vietnam and the Philippines have beefed up their defenses in response to perceived Chinese provocations[59] that all parties are increasingly likely to arrest the others' fishermen in claimed waters, which signals greater urgency across the region.[60] The risk of hot war from continuing failure to resolve certain territorial and resource claims in the region is evident. Numerous efforts at discussion between the disputants have not so far produced results.[61]

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55. Japan has administered the Senkaku Islands since the U.S. turned them over to Japan in conjunction with Okinawa in 1972. Ministry of Foreign Affairs Japan, *Senkaku Islands Q&A*, June 5, 2013, *available at* http://www.mofa.go.jp/region/asia-paci/senkaku/qa_1010.html. South Korea has held Dokdo continuously since the end of the Korean War but has claims going back centuries. Steven J. Barber, *Historical Facts about Korea's Dokdo Islands*, HIST. FACTS ABOUT KOREA'S DOKDO ISLAND, http://www.dokdo-takeshima.com (last visited Dec. 30, 2014).

56. Choe Sang-hun, *South Korean's Visit to Disputed Island Angers Japan*, N.Y. TIMES, Aug.10, 2012, http://www.nytimes.com/2012/08/11/world/asia/south-koreans-visit-to-disputed-islets-angers-japan.html?_r=0.

57. *China Seeks Korea's Support in Territorial Claims*, CHOSUN ILBO, Sept. 19, 2012, http://english.chosun.com/site/data/html_dir/2012/09/19/2012091901268.html.

58. Greg Torode, *Arrival of U.S. Sub in Phillipines Sign of Shifting Balance of Naval Power*, S. CHINA MORNING POST, Sept. 15, 2012, http://www.scmp.com/news/asia/article/1037174/arrival-us-sub-philippines-sign-shifting-balance-naval-power. *See, e.g.*, Hidemichi Katsumata, *Japan's Strategy Against Senkaku Island Dispute*, JAPAN SECURITY WATCH, (Sept. 14, 2012, 12:20 PM), http://jsw.newpacificinstitute.org/?p=10495 (*translated by* Kyle Mizokami) (providing a Japanese perspective on this escalation). The U.S. has specifically indicated that its defense commitment reaches the Senkaku/Diaoyu islands as Japanese administered territory. Paul Eckert, *Treaty with Japan Covers Islets in China Spat: U.S. Officials*, REUTERS, Sept. 21, 2012, http://www.reuters.com/article/2012/09/20/us-china-japan-usa-idUSBRE88J1HJ20120920; *PLA Warns US Over Backing Japan in Diaoyus Row*, S. CHINA MORNING POST, Sept. 13, 2013, http://www.scmp.com/news/china/article/1309056/china-military-tells-us-not-encourage-japan-over-isles.

59. *China's Maritime Disputes*, COUNCIL ON FOREIGN REL., http://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345#!/?cid=otr-marketing_use-china_sea_InfoGuide (last visited Dec. 30, 2014).

60. Choe Sang-hun, *Chinese Fisherman Kills South Korean Coast Guardsman*, N.Y. TIMES, Dec.13, 2011, http://www.nytimes.com/2011/12/13/world/asia/chinese-fisherman-kills-south-korean-coast-guardsman.html; Kim Tae-jong, *Illegal Chinese fishing boats to face heavier fines*, KOREA TIMES, Dec. 4, 2011, http://www.koreatimes.co.kr/www/news/nation/2011/12/117_100109.html.

61. Teddy Ng & Lawrence Chung, *Beijing Visit by Japanese Envoy Gives Chance to Repair Ties*, S. CHINA MORNING POST, Feb. 20, 2013, http://www.scmp.com/news/china/article/1154221/beijing-

B. Framing the Disputes

While the general fact of China's emergence as a great power may naturally give rise to security concerns among China's neighbors, there can be little doubt that peace would be better served by the elimination of risky disputes over uninhabited islands and their surrounding seas. In regard to the disputes addressed in this article, the cost of a war-like footing or war itself among three developed or rapidly developing nations—China, Japan, and South Korea (along with the U.S.)—would be enormous. The intra-Chinese dispute over Taiwan, while adding further complexity, is set aside here, assuming some shared "Chinese" interests in and mutual assertion of Chinese territorial claims on both sides of the Taiwan Strait.[62] The three states to be discussed primarily—China, Japan, and South Korea—are all U.N. members and parties to the 1982 UNCLOS.[63] Contributing to this tense situation has been a tendency of all three states, especially China and Japan, to push claims to base lines and related inland seas, territorial seas, and resource zones that clearly go beyond those contemplated by UNCLOS. Without clearly knowing who first started this cycle of confrontation and excess, the strategy of all appears to be aimed at creating strong bargaining chips as a counterweight to the other side's perceived excess claims. This brew of excess claims and bargaining chips leads to ever-rising escalation of the disputes.

Earlier, in the spirit of Deng Xiaoping's above statement about the wisdom of setting aside such sovereignty disputes and in the shadow of UNCLOS, it was anticipated that temporary joint resource development zones and fisheries could be negotiated while leaving the sensitive claims to uninhabited islands—territorial land claims not being addressed in UNCLOS—for future resolution. This strategy has proven largely fruitless, especially as to the vast oil and gas resources—with

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visit-japanese-envoy-gives-chance-repair-ties; *Japan-China 'Secret' Talks Held Over Island Row*, NATION, Oct. 16, 2013, http://nation.com.pk/international/16-Oct-2013/japan-china-secret-talks-held-over-island-row; *No Talks Unless Dispute Affirmed: China*, JAPAN TIMES, Sept. 21, 2013, http://www.japantimes.co.jp/news/2013/09/21/national/no-talks-unless-dispute-affirmed-china/#.VHJg7VfF9tl. After a rather belligerent year China seems to be taking up a more conciliatory approach, as has been evident with Vietnam as well. Teddy Ng, *China, Vietnam to Set Up Sea Exploration Group, China and Vietnam to Jointly Explore Waters*, S. CHINA MORNING POST, Oct. 14, 2013, http://www.scmp.com/news/china/article/1331106/china-vietnam-set-group-explore-disputed-south-china-sea; Okudera, *supra* note 46.

62. Taiwan has indeed piped in occasionally to make its concerns known. Lawrence Chung, *We Vow Not to Give In Even an Inch, Taiwanese President Ma Tells Japan*, S. CHINA MORNING POST, Sept. 14, 2012, http://www.scmp.com/news/china/article/1036214/we-vow-not-give-even-inch-taiwanese-president-ma-tells-japan.

63. When China signed and ratified UNCLOS it indicated several exceptions to its acceptance of the treaty, including specifically that nothing in its accession should be construed to conflict in any way with China's territorial law. Query whether this includes its claims within the nine dotted lines to the entire South China Sea and too much of the continental shelf under the East China Sea? UNCLOS does not include island claims. It is important to note that the U.S., though often a participant in these disputes, is not yet a party to UNCLOS, though there has been pressure for U.S. ratification. Mark Landler, *Law of the Sea Treaty is Found on Capitol Hill, Again*, N.Y. TIMES, May 23, 2012, http://www.nytimes.com/2012/05/24/world/americas/law-of-the-sea-treaty-is-found-on-capitol-hill-again.html.

only moderate contingent and not fully realized progress in a couple cases.[64] The reluctance of each party to surrender the leverage of their bargaining chips, which ultimately include uninhabited islands and the surrounding seas, has spawned an impasse. Added to these strategic considerations has been a strong dose of nationalist sentiments on all sides agitating to defend the sovereign territorial claims represented by the islands.[65] The Chinese government has been especially tolerant (some say encouraging of) public anti-Japanese demonstrations.[66] Perry Link has noted that this may be a dangerous game for China; if such demonstrations get out of hand they may backfire, turning the public wrath on China itself.[67]

This situation leaves the parties with a strategic log-jam and the question whether any logs can be gently removed from the disputes without collapsing into a state of war. As the level of volatility has increased over time, the urgency of this matter has increased. With some limited fishery exceptions, proposals to ease the risk of conflict and settle the resource disputes have not yet been fruitful.[68] That failure has led to the effort in this article to turn the process around and consider avenues to addressing the more volatile island disputes first.

Absent the nationalistic passions, the claims to sovereignty over disputed islands by all sides are coherent enough and could be easily resolved on the merits under now-established customary international law through some third-party dispute mechanism. Regarding Senkaku/Diaoyu, the impasse has long been the refusal of both China and Japan to submit the dispute for third-party arbitration or for Japan to even acknowledge there is a dispute to address. In the 2012 speech of

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64. Seima Oki, *China Vessels Hold Drills Near Gas Fields*, YOMIURI SHIMBUN, Mar. 19, 2012, http://china.timesofnews.com/china-vessels-hold-drill-near-gas-fields/; *Japan Protests to China Over Undersea Gas Drilling*, TOKYO TIMES (Feb. 2, 2012), http://www.tokyotimes.com/japan-protests-to-china-over-undersea-gas-drilling.

65. Song Wenzhou, *Nationalists Pose a Problem for Two Nations*, CAIXIN ONLINE (Dec. 6, 2013), http://english.caixin.com/2013-12-06/100614547.html.

66. William Wan, *Beijing Both Encourages and Reins in Anti-Japan Protests, Analysts Say*, WASH. POST, Sept. 17, 2012, http://www.washingtonpost.com/world/beijing-both-encourages-and-reins-in-anti-japan-protests-analysts-say/2012/09/17/dc8c188e-0188-11e2-9367-4e1bafb958db_story.html?wprss=rss_asia-pacific; Jessica Weiss, *Nationalism and Anti-Japan Demonstrations in China*, MONKEY CAGE (Sept. 19, 2012), http://themonkeycage.org/blog/2012/09/19/nationalism-and-anti-japan-demonstrations-in-china/. China's encouragement of nationalistic demonstrations has been evident in China's ability to turn on and off such demonstrations. *China Tells Citizens not to hold Anti-Japan Protests*, KYODO NEWS, Sept. 19, 2012, http://www.thefreelibrary.com/UPDATE1%3A+China+tells+citizens+not+to+hold+anti-Japan+protests.-a0303222919. Such nationalism has especially been stoked by lingering sentiment about Japan's invasions in World War II.

67. Perry Link, *Beijing's Dangerous Game*, N.Y. REVIEW OF BOOKS (Sept. 20, 2012, 11:45 PM), http://www.nybooks.com/blogs/nyrblog/2012/sep/20/beijings-dangerous-game. *See also* June Teufel Dreyer, *The Sino Stranglehold: How Badly Could the Chinese Protests Hurt Japan's Economy?*, FOREIGN POL'Y, Sept. 21, 2012, http://www.foreignpolicy.com/articles/2012/09/21/the_sino_stranglehold.

68. Teddy Ng, *Japanese Propose Plan to Avoid Maritime Conflicts, Foreign Minister Seeks Endorsements from Wen Jiabao and Wants to Resume Talks on Gas Fields*, S. CHINA MORNING POST, Nov. 24, 2011, http://www.scmp.com/article/985738/japanese-propose-plan-avoid-maritime-conflicts.

then Japanese Prime Minister Noda before the General Assembly he invoked international law and seemingly signaled a willingness to submit the matter for third-party arbitration, but China's long-standing refusal may have made this no more than a safe ploy.[69] More recently, Japanese Prime Minister Shinzo Abe's invocation of the rule of law as a basis to address these disputes met with Chinese condemnation.[70] China has never filed a general submission to the ICJ and has especially resisted application of the ICJ or other third-party dispute mechanisms for resolving disputes over sovereignty in similar circumstances.[71] Respecting Dokdo/Takeshima, South Korea likewise refuses such third-party dispute assistance, claiming sovereignty as a justification.[72] Japan has indicated a willingness to submit the matter to the ICJ.[73]

Because China, Japan, and South Korea are within 400 nautical miles ("nm") of each other, all claimed resource zones in these enclosed seas overlap and require the parties to negotiate an "equitable solution" as is required under UNCLOS.[74] The claiming of excessive strait baselines from which to measure the territorial seas by both Japan and China does not contribute to efforts to find such a solution. In 2012, Beijing spurred increased tension by submitting to the U.N. strait baselines for the Diaoyu/Senkaku Islands.[75] Added to the impasse is the seeming Japanese reluctance to openly accept that it cannot claim the 200nm resource zones under UNCLOS for the uninhabited Senkaku/Diaoyu Islands, a limitation both

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69. Japanese Prime Minister Yoshihiko Noda United Nations General Assembly Address, CSPAN (Sept. 26, 2012), *available at* http://www.c-span.org/video/?308405-4/japanese-prime-minister-yoshihiko-noda-united-nations-general-assembly-address; *Time to Put Inferiority Complex Behind Us*, GLOBAL TIMES, Sept. 28, 2012, http://www.globaltimes.cn/content/735883.shtml.

70. *Japan, Philiippines Using Rule of Law Pretext: China*, XINHUA, June 27, 2014, http://news.xinhuanet.com/english/china/2014-06/27/c_133443927.htm.

71. For example, its refusal of such third party dispute jurisdiction occurred when the Philippines brought a similar dispute over the Scarborough Shoal in the Spratly Islands to the International Tribunal on the Law of the Sea. *See, e.g.*, *China Says Philippines Violates International Maritime Law in Claiming South China Shoal*, FOX NEWS (Apr. 18, 2012), http://www.foxnews.com/world/2012/04/18/china-claims-philippines-is-violating-maritime-law/; Samantha Hoffman, *Sino-Philippine Tension and Trade Both Rising amid Scarborough Standoff*, CHINA BRIEF, vol. 12/9, Apr. 27, 2012, *available at* http://www.jamestown.org/uploads/media/cb_04_27.pdf; Greg Torode, *Manila Action of South China Sea Could Risk Aggravating Disputes*, S. CHINA MORNING POST, Jan. 26, 2013, http://www.scmp.com/news/asia/article/1136191/manilas-action-over-south-china-sea-could-risk-aggravating-disputes.

72. *See generally* PILKYU KIM, CLAIMS TO TERRITORY BETWEEN JAPAN AND KOREA IN INTERNATIONAL LAW (Xlibris, 2014).

73. J. Berkshire Miller, *The ICJ and the Dokdo/Takeshima Dispute*, DIPLOMAT (May 13, 2014), http://thediplomat.com/2014/05/the-icj-and-the-dokdotakeshima-dispute/.

74. UNCLOS, *supra* note 6, arts. 74 and 83.

75. This move was seen as a shift away from the previous policy of setting aside the dispute and negotiating over joint exploration for energy resources and the declaration was accompanied by increased presents of Chinese surveillance ships in the area. Teddy Ng, *Beijing Gives UN Baselines for Diaoyu Islands, Spurring Tension with Japan*, S. CHINA MORNING POST, Sept. 15, 2012, http://www.scmp.com/news/china/article/1037254/beijing-gives-un-baselines-diaoyu-islands-spurring-tension-japan.

China and Taiwan have acknowledged.[76] But perhaps the biggest log in the log-jam is China's claim to nearly all of the continental shelf between China and Japan as part of what it claims is a natural prolongation of the continental shelf—even though UNCLOS does not appear to allow such option in this situation of opposite states within four hundred nautical miles of each other.[77] China's similarly excessive claim to nearly all of the South China Sea certainly does not encourage hope that it would readily abandon this excessive claim in favor of a more equitable solution.[78] Efforts have been made by all sides to negotiate cooperative arrangements in the form of joint resource zones envisioned by UNCLOS but with limited success in implementation.[79]

The pending island disputes have left the parties with too much uncertainty to judge the reasonableness of any proposed resource allocation under UNCLOS guidelines. Before UNCLOS South Korea and Japan were successful at negotiating a joint resource development zone and they have since reached a fisheries agreement.[80] While China and Japan managed to reach a tentative understanding, they labeled a "principled consensus," in June 2008 calling for joint exploration and possible joint resource development in a 2700 square kilometer area in the East China Sea, it is not clear whether this arrangement will be fully developed and carried out—there being considerable mutual distrust.[81] Japan and China did reach a joint fisheries agreement covering a large area but excluding the

76. JON M. VAN DYKE, MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 61-62 (2009).

77. *Id.* at 58. China has submitted this continental shelf prolongation to the U.N. in a submission entitled "Partial Submission Concerning the Outer Limits of the Continental Shelf beyond 200nm in the East China Sea." *China Makes U.N. Appeal for Maritime Claim*, UPI, Dec.17, 2012, http://www.upi.com/Top_News/Special/2012/12/17/China-makes-UN-appeal-for-maritime-claim/UPI-60871355720880/.

78. *South China Sea, Full Unclosure?*, ECONOMIST, Mar. 24, 2012, http://www.economist.com/node/21551113/print.

79. Keyuan Zou, *Sino-Japanese Joint Fishery Management in the East China Sea*, 27 Marine Pol'y 125, 132-40 (2003) (includes the translated agreement as an appendix).

80. Choon-Ho Park, *Seabed Boundary Issues in the East China Sea*, *in* Seabed Petroleum in Northeast Asia: Conflict or Cooperation? 18, 18-22 (Selig S. Harrison ed., Woodrow Wilson Int'l. Ctr. for Scholars, 2005), *available at* http://www.wilsoncenter.org/sites/default/files/Asia_petroleum.pdf. The Japan-Republic of Korea Agreement on Fisheries of 28 November 1998, entered into force on 22 January 1999, as revised on 17 March 1999.

81. Press Release, Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Jiang Yu's Remarks on the Principled Consensus Reached between China and Japan on the East China Sea (June 18, 2008), *available at* http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t466675.shtml; Press Release, Ministry of Foreign Affairs of Japan, Joint Press Conference by Minister of Foreign Affairs Masahiko Koumura and Minister of Economy, Trade and Industry Akira Mari (June 18, 2008), *available at* http://www.mofa.go.jp/announce/fmpress/2008/6/0618.html (regarding Cooperation Between Japan and China in the East China Sea). The tentative nature of the June 18, 2008 "principled consensus" was reflected in even the announcements of the arrangement being made in separate press conferences and the arrangement itself leaving much open for further discussion, though it does provide for cooperation in exploration and some joint investments.

waters below twenty-seven degrees north near the Senkaku/Diaoyu Islands.[82] A comprehensive resolution of these problems in the most sensitive areas seems to elude the parties, as they fear surrendering critical bargaining chips, the disputed islands being the most visible. Do current international legal principles offer a way out of these impasses?

III. INTERNATIONAL LEGAL PRINCIPLES: AN OVERVIEW

In the context of both sets of island disputes under discussion, the parties are claiming historical title to the islands themselves and claiming rights to maritime resources, including fisheries and oil, and gas deposits in the adjoining seas between the claimant states.[83] Because the states in question are in close proximity across their adjoining seas and the islands are at intermediate locations, the island disputes have long been contingent factors for resolving the maritime disputes. The discovery of very large oil and gas reserves—some have speculated possibly on the scale of the Middle East or the North Sea—and disputes over the maritime rights that attach to such small islands have created a web of competing claims.[84] This complex web of claims has often featured the disputed islands and various baseline claims as bargaining chips in the maze of competing resource claims, making resolution of claims that would be relatively easy to resolve in legal terms quite difficult. Elements of nationalism over the island claims have elevated the political sensitivity of these disputes in ways that make political compromise hard to achieve. The challenge has been to unravel these disputes to permit development of sorely needed resources.

In regard to the disputes over these uninhabited islands and the associated maritime boundary and resource claims under present discussion, two rapidly evolving bodies of international law are implicated: territorial claims to uninhabited islands, though not addressed by UNCLOS, are addressed by customary international law; and, the maritime boundary and resource claims, which are addressed rather comprehensively by UNCLOS and associated jurisprudence. These two areas are considered in the following subsections.

A. Customary International Law Relating to Sovereignty over Uninhabited Islands

Taking up island disputes first, it is a common characteristic of these disputes over remote uninhabited islands in East Asia that a current occupant or claimant vies for sovereignty with other claimants based on assertions of historical title. In the absence of guiding international treaties, this issue has been governed by

82. Zou, *supra* note 79, at 133.

83. *See generally* VAN DYKE, *supra* note 76; KIM, *supra* note 72.

84. While some have worried that the resource claims are exaggerated, they clearly do shape and encourage territorial claims. Cary Huang, *Diaoyu Islands Dispute about Resources Not Land*, S. China Morning Post, Dec. 4, 2012, http://www.scmp.com/news/china/article/1096774/diaoyu-islands-dispute-about-resources-not-land. *See* U.S. Energy Info. Admin., East China Sea (2012), *available at* http://www.eia.gov/countries/analysisbriefs/east_china_sea/east_china_sea.pdf; Roach, *supra* note 34, at 1-5.

customary international law. Measuring the viability of competing claims has long involved sifting through remote historical records. As a result, the customary law regarding territorial disputes over uninhabited islands is an area of law peculiarly suited to resolution by the ICJ or international arbitral tribunals, although such referral has proven especially sensitive for Asian states.

A number of guiding customary international law principles regarding territorial claims to uninhabited islands have evolved through case law in recent years. Such claims often implicate issues of historical discovery and effective occupation. In the colonial period, for previously unclaimed islands (belonging to no one, characterized as "*terra nullius*"), discovery and some formal official act to perfect a claim of sovereignty were generally thought sufficient to establish a claim.[85] Because the pre-modern Asian international order may have lacked a concept of territorial sovereignty, as this concept is understood today,[86] further difficulty was added to assessing such historical claims by regimes, which may have lacked a habit to formally assert such claims. This difficulty was made worse by an historical lack of serious interest in such remote islands in the days when they offered fewer accessible resources.[87]

By the mid-twentieth century the colonial era principles that rewarded Western discovery began to fade. Modern international principles that rejected colonialism and embraced modern notions of state sovereignty tended to give little weight to ambiguous claims of historical title based on mere discovery or proximity.[88] A series of judicial decisions emphasized "effective occupation," which required some acts of administration and control beyond discovery.[89] In the *Pedra Branca* case, the ICJ emphasized "effective administration" in awarding the island to Singapore.[90] Effective administration can involve things such as reclamations, regulation of fishing, construction and maintenance of structures, and the investigation of accidents.

As one commentator emphasized, "active occupation and effective control over territory supersedes ambiguous ancient title."[91] In the *Sovereignty Over Pulau Ligiton and Pulau Sipadan* case, a dispute between Indonesia and Malaysia over a group of very small islands encompassing just 0.13 square kilometers, the

85. VAN DYKE, *supra* note 76, at 47-49, 61.

86. Pilkyu Kim, Reassessment of Korea-Japan Relations: Acquisition of Dokdo/Takeshima and "Effectiveness," Address Before the International Symposium on Dokdo Island (May 7, 2009)*in* PROCEEDINGS OF THE INT'L DOKDO SYMPOSIUM 2009, at 40-44; Tao Cheng, *The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition*, 14 Va. J. Int'l L. 221, 242-43 (1973-1974).

87. Cheng, *supra* note 86, at 246.

88. VAN DYKE, *supra* note 76, at 47-49, 61.

89. *See* Minquiers and Ecrehos (Fr./U.K.), Judgment, 1953 I.C.J. 47 (Nov. 17); Sovereignty Over Clipperton Island (Fr. v. Mex.) (1931), *reprinted in* 26 AM. J. INT'L L. 390 (1932); Island of Palmas (U.S. v. Neth.), 11 R.I.A.A. 831 (Perm. Ct. Arb. 1925).

90. Sovereignty Over Pedra Branca/Pulau BatuPuteh, Middle Rocks and South Ledge (Malay./Sing.), Judgment, 2008 I.C.J. 12, ¶¶ 170-72 (May 23).

91. Alexander M. Peterson, *Sino-Japanese Cooperation in the East China Sea: A Lasting Arrangement?* 42 Cornell Int'l L.J. 441, 451 (2009).

ICJ held that mere discovery was not enough, that "effective occupation," including displays of sovereignty and administration were essential to prove ownership.[92] The ICJ further held that failure to protest another state's occupation is *de facto* acceptance.[93] The Court found effective occupation based on a "continued display of authority [that] involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority."[94]

As Greg Austin summarizes it, "[i]nternational customary law recognizes acquisition of title to territory belonging to no-one (terra nullius) through discovery, but this title remains inchoate and must be converted to a more complete title through continued, peaceful and unprotested exercise of sovereignty."[95] Merely showing that some private nationals of the claiming state, such as fishermen, visited the islands from time to time would be insufficient.[96] Austin notes that you can weigh the relative strength of competing historical claims through analysis of historical, geographical, and administrative circumstances.[97] Case law also emphasizes a "critical date," such that acts affected after the joining of a dispute cannot have a bearing on the sovereignty claim.[98] This "critical date" aspect, for example, would limit China's ability to perfect its claims to contested islands in the South China Sea by building platforms or other occupation activities.

Scholars and officials in East Asia often raise an irredentist problem, questioning whether the heightened standards of "effective occupation" should be applied to claims that arose in an earlier historical period before the West arrived on the Asian scene.[99] Such critics favor the application of standards contemporary to the time the claim arose.[100] But this argument raises a policy problem for current tribunals about whether to give effect to either colonialist or imperialist standards that applied at the time of alleged ancient discovery. The better view appears to require that some standards of effective occupation be applied even to claims originating in ancient times. Ancient claims also face a problem of proof

92. Sovereignty Over Pulau Ligiton and Pulau Sipadan (Indon./Malay.), Judgment, 2002 I.C.J. 625 (Dec. 17).

93. *Id.* ¶ 148.

94. *Id.* ¶ 134.

95. GREG AUSTIN, CHINA'S OCEAN FRONTIER, INTERNATIONAL LAW, MILITARY FORCE AND NATIONAL DEVELOPMENT 36 (Canberra: Allen & Unwin, 1998). In this context *terra nullius* generally refers to territory not ruled by a recognized state, which could be the consequence of no previous discovery and claim or abandonment of a previous claim.

96. Pulau Sipadan, 2002 I.C.J. ¶ 140.

97. AUSTIN, *supra* note 95, at 36-40.

98. *Id.* at 40. Austin notes that in the *Island of Palmas Case* the critical date was not when the dispute arose but when it became "crystallized," when the parties "are no longer negotiating or protesting, or attempting to persuade one another." Rather, they have taken up positions and are standing on their respective rights. *Id.*

99. Tao Cheng, *supra* note 86, at 2642-43.

100. *Id.*

that a modern tribunal may be reluctant to address. Claims to the uninhabited islands addressed herein face nearly all of these challenges.

B. Maritime Resource Boundaries under UNCLOS

Though UNCLOS does not address the island sovereignty claims, it is highly relevant in regard to the related maritime resource boundary disputes. UNCLOS governs the allowance of territorial seas and other resource zones associated with all coastal areas, including islands.[101] With research showing major oil and gas reserves, as well as rich fishery zones, at or near both sets of islands, UNCLOS and its various authoritative interpretations offer very useful guidance toward resolving these testy disputes.[102] UNCLOS allows states to claim four designated maritime zones relevant to the present disputes: the inland sea, the territorial sea, the EEZ, and the continental shelf.[103] Air Defense Identification Zones, as has recently been proclaimed by China, are not covered by UNCLOS or other maritime treaties.[104] The area beyond these four zones is the high seas, where navigational freedom of seas prevails and seabed resources are treated as part of the common heritage of mankind.[105]

Where various baselines and boundaries are drawn, in the East China Sea and the Sea of Japan, will have large implications for the major associated resource claims involved in the disputes under consideration here. The rights to the disputed islands and the associated resource rights will likewise implicate the resource boundaries that emanate outward from base lines. The widely varied consequences, in respect to various possible outcomes of the island sovereignty disputes, explains the difficulty of reaching provisional cooperative arrangements with regard to the maritime resource disputes: as disputants are reluctant to embrace a tentative agreement that appears to presume a particular territorial outcome.

Under UNCLOS, baselines are generally drawn at the low tide mark on land and strait baselines are allowed where the coast is "deeply indented" or has a "fringe of islands."[106] Coastal areas may include islands as base points in a strait-baseline delineation only where the resulting baselines do "not depart to any

101. *See generally* UNCLOS, *supra* note 6.

102. *See* VAN DYKE, *supra* note 76; AUSTIN, *supra* note 95. While all three disputants in the present discussion have signed and ratified UNCLOS, the U.S. has only signed but not ratified the treaty, though the U.S. long ago proclaimed it adhered to all of its provisions except those respecting deep sea bed minerals and their management. The matter was recently again before the U.S. Senate to consider ratification, which key Republicans have long opposed. *See* Mark Landler, *Law of the Sea Treaty Is Found on Capitol Hill, Again*, N.Y. Times, May 23, 2012, http://www.nytimes.com/2012/05/24/world/americas/law-of-the-sea-treaty-is-found-on-capitol-hill-again.html?_r=0. The U.S. lack of ratification no doubt weakens its leverage in pushing others to settlement of disputes under its terms.

103. UNCLOS, *supra* note 6, arts. 2, 8, 55-56, 76, 86-87.

104. Peter A. Dutton, *Caelum Liberum: Air Defense Identification Zones Outside Sovereign Airspace* 103 Am. J. Int'l L. 691, 694 (2009).

105. UNCLOS, *supra* note 6, arts. 86-87.

106. *Id.* art. 7(1).

appreciable extent from the general direction of the coast."[107] Archipelagic states, which for Japan include the Ryukyu Islands archipelago to the south of Japan encompassing most of the area opposite to China, are allowed to draw strait baselines "joining the outermost points of outermost islands."[108]

Under UNCLOS, internal waters include those sea areas inland from baselines and the territorial sea and other zones emanate outward from the base line.[109] UNCLOS allows up to 12nm for territorial seas.[110] This applies both to islands and continental coasts and is fully under the sovereignty of the coastal state.[111] States are also allowed to claim up to 200nm of EEZ from the same baselines, where such states have exclusive rights in fisheries and other natural resources.[112] The 200nm EEZ is likewise provided in relation to both continental and island coasts.[113] A continental shelf of up to 200nm and, in some cases where the natural prolongation extends further, up to 350nm, is allowed.[114] Under this provision, all states, regardless of the contours of their continental slope, are entitled to at least a 200nm continental shelf, with an exception for opposite or adjoining states with less than 400nm between them.[115]

For opposite or adjoining states with potentially overlapping resource jurisdiction, UNCLOS requires parties to reach an agreement "on the basis of international law in order to reach an equitable solution" in delimiting resource zone boundaries.[116] While the 1969 *North Sea Continental Shelf* case spoke of natural prolongation,[117] the adoption of UNCLOS Articles 74(1) and 83(1) suggest an agreement on "equitable" boundaries; in tandem with Article 76(1), this has brought about the effective demise of this notion for opposite states within 400nm of each other.[118] The ICJ made this clear in the 1985 *Libya v. Malta* case, stating:

> Since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the states concerned or in proceeding to a delimitation as between their claims.[119]

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107. *Id.* art. 7(3).

108. *Id.* art. 47(1).

109. *Id.* art. 8.

110. *Id.* art. 3.

111. *Id.* arts. 2, 4-5.

112. *Id.* art. 57. Islands are entitled to a territorial sea, an EEZ, and a continental shelf "in accordance with the provisions . . . applicable to other land territory." *Id.* art. 121(2).

113. *Id.* arts. 57, 60-61, 74.

114. *Id.* art. 76.

115. *Id.* arts. 76(1), 74.

116. *Id.* arts. 74, 83.

117. North Sea Continental Shelf Case (Ger. v. Den./Neth.), 1969 I.C.J. 3 (Feb. 20).

118. VAN DYKE, *supra* note 76, at 58.

119. Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, ¶ 39 (June 3). The case involved a similar situation to China and Japan, with a continental state (Libya) and an opposite offshore island state

An equitable solution also appears to take account of proportionality in regard to the relative length of the opposing coastlines. Jon Van Dyke points out that, while the starting point seems to be equidistant or median lines, tribunals will make adjustments, as they did in the *Libya v. Malta* case, to bring the ratio of the relative length of coastlines more into line with the maritime space allocated.[120]

Of particular relevance to the present discussion of uninhabited islands, UNCLOS Article 121(3) provides, "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf," though such islands are entitled to a territorial sea.[121] A precise definition of what would be a mere rock is not afforded, though both island groups under present discussion potentially fall under this provision.[122] Is an island that has grass and trees growing on it but has never been used for normal human habitation a mere rock under this provision? There is certainly a policy argument that such designation would greatly reduce associated disputes.

With little agreement over rights to either the uninhabited islands or the boundaries of the maritime resource zones at issue, the earlier decision of all parties to set aside the island territorial disputes and work on cooperative use of resources under UNCLOS seemed practical. UNCLOS encourages "provisional cooperative arrangements."[123] With continuing disagreement over such islands and only limited often-unrealizable cooperation concerning resource areas, especially between China and its potential partners, this approach has proven a failure. These island disputes, along with disagreement over baselines and respective rights in the continental shelf, have given rise to the current impasse and related security concerns. That uninhabited islands are involved, and not merely

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(Malta). A state not facing an opposite state within 400nm can sometimes justify an extended continental shelf based on natural prolongation or appurtenant to islands, as was recognized by the U.N. Commission on the Limits of the Continental Shelf with respect to Japanese claims to uncontested areas in April 2012. *See UN Approves Japan's Claim on Wider Areas*, YOMIURI SHIMBUN, Apr. 29, 2012, http://news.asiaone.com/News/AsiaOne+News/Asia/Story/A1Story20120429-342721.html (netting Japan 310,000 square kilometers).

120. Continental Shelf, 1985 I.C.J. ¶¶ 11, 64-65; VAN DYKE, *supra* note 77, at 59. *See also* Gulf of Maine Area (U.S. v. Can.), 1984 I.C.J. 246 (Oct. 12); Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38 (June 14); Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), 2001 I.C.J. 40, at 111 (Mar. 16). *See also* Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012, ITLOS Rep. 1, ¶ 319, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1-C16_Judgment_14_02_2012.pdf (reflecting that St. Martin's Island got no EEZ based on such adjustment in competition with an opposite continental land, even though the island was substantial with 3,700 permanent residents).

121. UNCLOS, *supra* note 6, art. 121(3).

122. Sourabh Gupta has pointed out that some very small uninhabited islands have been the subject of valid or pending claims for an EEZ and a continental shelf, including Japan's low-lying Okinotorishima, the very small U.S. Howland and Baker Islands, and Australia's remote Heard and McDonald Islands. Sourabh Gupta, *Murky Waters Surround the Rule of Law in the South China Sea*, East Asia Forum (July 20, 2014), http://www.eastasiaforum.org/2014/07/20/murky-waters-surround-the-rule-of-law-in-the-south-china-sea/.

123. UNCLOS, *supra* note 6, arts. 74, 83.

maritime resource claims, has also encouraged nationalist passions that give priority to sovereignty claims and make legal settlements difficult. Compromise, even in areas where the law seems clear, has eluded the parties, as they fear surrendering any claim that may possibly serve as a bargaining chip in dealing with other issues. An assessment of Dokdo/Takeshima and Senkaku/Diaoyu respectively in the next two sections is followed in the third section below by an assessment of the parties' related resource boundary claims and agreements.

IV. SOVEREIGNTY OVER THE DOKDO/TAKESHIMA ISLANDS

The competing South Korean and Japanese legal claims to the Dokdo/Takeshima Islands share much in common with the Senkaku/Diaoyu Islands dispute and the disputes over other uninhabited islands in the South China Sea, even while the historical narrative and present-day tangle of claims for each set of islands remain distinct. As such, any third-party dispute resolution process that may be agreed offers tremendous opportunity to establish local legal precedent in East Asia that may be helpful in resolving other similar disputes, especially relating to the sufficiency of ancient discovery, the more common-place historical indicia of effective occupation, and the associated maritime resource boundary claims.

Dokdo/Takeshima is located in the Sea of Japan (what South Korea calls the East Sea) and consists of two very small rocky islands and approximately thirty-two smaller outcroppings with a total area of only 0.18 square kilometers, approximately 47nm from South Korea's occupied and inhabited Island of Ullungdo and 86nm from Japan's occupied and inhabited Oki Island.[124] The islands are currently, and have for decades been, occupied by South Korea.[125]

While the dominant view in case law and the literature has generally been favorable to the South Korean territorial claim to the Dokdo/Takeshima Islands, submitting the island dispute to the ICJ or another arbitration process, as was long ago offered by Japan,[126] may be more useful to Japan than simply reaching a negotiated settlement. A definitive answer on the merits can only be offered by a tribunal with proper jurisdiction.[127] Such a tribunal can help to establish important legal principles. Such a process would allow the parties to test the water on various legal issues that surround this and other similar East Asian island disputes. Such test could facilitate gentle removal of a log from the above-noted log-jam.

As with many uninhabited islands, the historical record to measure the required "effective occupation" of Dokdo/Takashima is thin. In the face of such thinness, South Korea, the current occupant of several decades standing would

124. VAN DYKE, *supra* note 76, at 46.

125. *The Korean Government's Basic Position on Dokdo*, Ministry of Foreign Aff. Republic of Korea, http://dokdo.mofa.go.kr/eng/dokdo/government_position.jsp (last visited Nov. 24, 2014).

126. Miller, *supra* note 73.

127. The concern is to submit the matter to a tribunal with proper jurisdiction which, for the ICJ, would require consent to jurisdiction either in the case or generally to compulsory jurisdiction. *See* Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 1060 [hereinafter ICJ Statute].

certainly enjoy an advantage. Japan bases its claim to the Dokdo/Takeshima Islands on the theory that the islands were *terra nullius* on February 22, 1905, when Japan first claimed them—under Korean protest—by occupation through a cabinet decision and proclamation by the Governor of Japan's Shimane Prefecture.[128] After such proclamation, on June 5, 1906, the Japanese government formally issued a fishing license to one Yozaburo Nakai.[129] Before 1905, Japan could only claim connection through the private acts of Japanese fisherman, with official Japanese permission, visiting the islands as early as 1618; this largely ended in 1696 when Ulleungdo (not specifically Dokdo, which was merely a stopover on the way) was acknowledged by the Japanese Shogunate as under Korean sovereignty, resulting in Japanese being denied permission from their government to visit the area of either set of islands.[130] Japan does raise the issue of Korean "withdrawal" from the islands from the 15th to the 19th centuries, during the period when the region was dominated by the Mongol empire, but South Korea highlights a substantial level of visits and contacts during this period and its official re-colonization policy from 1881 to justify the maintenance of its claims and a lack of abandonment.[131]

South Korea claims title to Dokdo based on ancient discovery in 512 followed up by claimed "effective occupation" in the years since.[132] The Korean position is further bolstered by the claim that Japan was bound to surrender the islands to Korea at the end of World War II, both under Japan's 1945 Instrument of Surrender and the 1951 San Francisco Peace Treaty.[133] The relative proximity of the islands to Korean territory and South Korea's current occupation since asserting its claim in 1952 and building a guarded lighthouse in 1954—even though protested by Japan every year—would seem to further bolster the Korean claim in any close case.[134] Though the Korean historical title claims are thin, as is common for remote uninhabited islands, they appear more substantial than Japan's claims.

As discussed by the late Professor Pilkyu Kim, South Korea cites a number of classical Korean texts, such as the Chronicles of the Three Kingdoms, to support the following chronology in support of the Korean case: first, the islands were first discovered—creating an inchoate title—along with Ulleungdo in 512 by the Silla Kingdom, as inferred from the Chronicles of the Three Kingdoms;[135] second, disputes over the islands relating to fisheries were reportedly settled with Japan

128. Pilkyu Kim, *supra* note 86, at 39-98, 40-44.

129. *Id.*

130. *Id.*

131. *Id.* at 58-60.

132. *Id.* at 45-50.

133. Treaty of Peace with Japan art. 2, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45. Korea was not a party to the 1951 peace treaty.

134. While any occupation after the critical date that the dispute arises would presumably have no effect on the underlying claims, it would seem to at least establish continued occupation and non-abandonment to the present. *See* Peterson, *supra* note 91; AUSTIN, *supra* note 95, at 40.

135. Pilkyu Kim, *supra* note 86, at 45-50.

recognizing Korea's sovereign rights in 1696;[136] third, two prosecutions, one by the Royal Court of Korea in 1716 and one by Japan (for smuggling from Japan to a foreign island (Dokdo)) in 1837 tend to demonstrate a shared belief in Korean sovereignty;[137] fourth, a number of edicts relating to the islands in the late 19th century in the lead up to the Japanese occupation demonstrate continued Korean occupation;[138] fifth, South Korean seizure of the islands in 1954 further indicates such claim;[139] and sixth, continuing South Korean control—over Japanese protest—sustains that claim up to the present.[140] Kim notes that Japan never protested Korean actions until 1905—perhaps the critical date.[141] He notes that a number of Korean official maps over the centuries, which have shown Dokdo as Korean territory, have not been challenged.[142]

This dispute has been made more difficult by the failure of World War II and post-war declarations and treaties to resolve the issue or specifically mention these remote islands. In particular, the San Francisco Peace Treaty between Japan and most allied powers, for which Korea was merely a beneficiary but not a party,[143] failed to expressly include the Dokdo/Takeshima Islands among the listed territories to be surrendered by Japan.[144] South Korea emphasizes that it should have been included because the San Francisco Peace Treaty incorporated the Cairo Declaration of 1943, which called for the forfeiture of all Japanese territory taken "by violence or greed."[145] Likewise, the 1945 Potsdam Declaration stated that, "[t]he Terms of the Cairo Declaration shall be carried out and the Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and other minor islands as we determine."[146]

Not being a party to the San Francisco Peace Treaty, South Korea claims it recovered its territory by virtue of the September 2, 1945 Instrument of Surrender, by which Japan agreed to both declarations, resulting in the establishment of the Republic of Korea on August 15, 1945 and its recognition by the U.N. on December 8, 1948.[147] While the failure of the San Francisco Peace Treaty to specifically mention the islands leaves some ambiguity, it would seem that the

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 49, 75-76.

142. *Id.* The author mentions that even a couple Japanese maps have excluded Dokdo/Takeshima Island from Japanese territory.

143. Minoru Yanagihashi, The Territorial Questions in East Asia and San Francisco Peace Treaty: Historical Perspective, Paper Presented at the 2011 Annual Meeting of the Association of Asian Studies in Honolulu, Hawaii (Apr. 2011).

144. *Id.*

145. Press Release, U.S. State Dep't, Cairo Declaration (Dec. 3, 1943), *available at* http://www.ndl.go.jp/constitution/e/shiryo/01/002_46/002_46_001l.html.

146. Potsdam Declaration: Proclamation Defining Terms for Japanese Surrender (July 26, 1945), *in* 2 MINISTRY OF FOREIGN AFF.: NIHON GAIKO NENPYO NARABINI SHUYO BUNSHO: 1840-1945 (1966), *available at* http://www.ndl.go.jp/constitution/e/etc/c06.html.

147. Pilkyu Kim, *supra* note 86, at 69-71.

connection of the Japanese claim to its expansionist policies in 1905, including the conquest of Korea, favor the South Korean claim. South Korea's subsequent acts to seize back the islands from 1952-1954, soon after World War II and its own Korean War, would further argue in South Korea's favor.[148]

An important related issue, further discussed below, is the likelihood that South Korea would not attempt to claim any resource zones under UNCLOS, beyond the territorial sea, thus, making Dokdo/Takeshima irrelevant to delineating resource zone boundaries.[149] Jon Van Dyke notes the near futility of either party claiming resource zones for these barren rocks, though the Japanese have been reluctant to explicitly so state out of fear this may affect other island claims Japan seeks to maintain.[150] South Korea may be less constrained and may move forward to address related resource boundary issues if it acknowledges that Dokdo/Takeshima will not have an impact on median boundary lines. These "rocks" clearly cannot independently sustain life and such limitation would be the likely outcome of any dispute resolution process before the ICJ or otherwise. With greater proximity to South Korea, the islands would be on the South Korean side of any equidistant or median line that may someday be realistically adopted to delineate resource zone boundaries between the South Korean Island of Ullongdo and the Japanese Island of Oki.

With much less nationalism at play on the Japanese side for this particular island dispute (in comparison to the Senkaku/Diaoyu dispute discussed below), there appears little incentive for Japan to insist on its claim to the island if any advantage may be achieved by conceding to a dispute resolution process. Indeed, Japan first proposed submission of the matter to the ICJ in 1954 and again in 1962.[151] Rather than surrender its claim, Japan would seemingly be more interested in engaging a process that may set a favorable precedent in regard to its other island and maritime disputes. For South Korea, nationalistic sentiments are much more deeply felt in relation to these islands and have seemingly stood in the way of its willingness to embrace such ICJ resolution. South Korea has argued that this is a matter of sovereignty and should not be subject to ICJ resolution as a mere territorial dispute.[152] Any distinction between territory and sovereignty appears weak and has never been a reason for declining ICJ assistance.[153] Most territorial disputes involve sovereignty.

The natural resource claims at stake in the surrounding sea areas, as discussed below, have lent a degree of urgency to this and other related disputes. This will

148. *Id.*

149. *See* Jon M. Van Dyke, *Addressing and Resolving the Dokdo Matter*, *in* PROCEEDINGS OF THE INT'L DOKDO SYMPOSIUM, *supra* note 86, at 137-58.

150. *Id.* at 152-53.

151. Ralf Emmers, *Japan-Korea Relations and the Tokdo/Takashima Dispute: The Interplay of Nationalism and Natural Resources* 12 (S. Rajaratnam Sch. of Int'l Studies Sing. (RSIS), Working Paper No. 212, 2010).

152. *Id.*

153. Brian Taylor Sumner, Note, *Territorial Disputes at the International Court of Justice*, 53 DUKE L.J. 1779, 1779 (2004). *See also* Island of Palmas, *supra* note 89, at 8.

hopefully encourage further consideration of the merits of a dispute resolution process that may bring clarity to the respective rights of the claimants and enable private companies from both sides and around the world to move forward on extraction of resources increasingly needed in the region. The post-war political climate appeared to be improving until the past couple years, as China's failure to address South Korean concerns in respect to military confrontations with North Korea and increasingly tense Sino-Japanese relations had brought South Korea and Japan much closer in their existing security alliance, despite continuing tensions over Japan's World War II legacy.[154]

The past couple years has seen a shift back toward greater hostility on which China has sought to capitalize. Of concern to Japan's shared primary security partner, the U.S., nationalistic sentiment on both sides threatens to undermine their historical security arrangement. On the South Korean side, such nationalism was on display in August 2012 when then President Lee Myung-bak made the first ever presidential visit to the Dokdo Islands and again when South Korea formally renamed peaks on the islands.[155] The recent emergence of a more nationalistic Japanese leadership under the Liberal Democratic Party has squandered a great deal of good will in the past year, as Korean wounds from World War II have been exposed.[156] One would hope this situation is salvageable and level heads will prevail.

V. SOVEREIGNTY OVER THE SENKAKU/DIAOYU ISLANDS

The Senkaku/Diaoyu Island claims pose a greater challenge than the Dokdo/Takeshima dispute discussed above, with high levels of nationalism at play on both sides in Japan and China, and an even more contentious relationship between the parties.[157] Despite efforts to avoid confrontation over this issue a number of disputes arose over recent years before things heated up to the tense

154. Both South Korea and Japan have had shared security arrangements with the United States since the end of the Korean War and World War II, respectively, and both host U.S. military bases, producing a need for cooperation. *See* Sang-hun Choe, *South Korea to Sign Military Pact with Japan*, N.Y. TIMES, June 28, 2012, http://www.nytimes.com/2012/06/29/world/asia/south-korea-to-sign-historic-military-pact-with-japan.html?_r=0.

155. *South Korea Renames Disputed Islands*, ABC NEWS (Oct. 28, 2012, 12:57 AM), http://www.abc.net.au/news/2012-10-28/an-sth-korea-renames-disputed-islands/4338020.

156. *South Korean President Unimpressed by Japanese PM's Attempt to Speak Korean*, S. CHINA MORNING POST, Mar. 26, 2014, http://www.scmp.com/news/asia/article/1457844/seoul-unmoved-japan-hails-bridge-building-summit?page=all; Alastair Gale, *How Bad Will South Korea-Japan Relations Get?*, WALL ST. J., June 24, 2014, http://blogs.wsj.com/korearealtime/2014/06/24/how-bad-will-south-korea-japan-relations-get/.

157. *See* CHIEN-PENG CHUNG, DOMESTIC POLITICS INTERNATIONAL BARGAINING AND CHINA'S TERRITORIAL DISPUTES, ch. 3 (Routledge 2004) (dealing with the nationalist politics behind the Senkaku/Diaoyu dispute). As China has developed and gained greater power over the past decade there has appeared a heightened sense of Chinese nationalism over these island disputes. *See* Erica Strecker Downs & Phillip C. Saunders, *Legitimacy and the Limits of Nationalism: China and the Diaoyu Islands*, *in* THE RISE OF CHINA 41, 42-43, 73 (Michael E. Brown et al. eds., 2000).

situation that prevails today.[158] Recent efforts to even sit down and discuss this dispute have been fraught with obstacles from nationalistic sovereignty claims.[159] As with Dokdo/Takeshima, the vast store of natural resources of gas and oil thought to be in the area, not to mention fisheries, lends great urgency to resolving the disputes. While the former Japanese Foreign Minister Koichiro Genba appeared to signal, in a commentary in the International Herald Tribune, that Japan might accept the jurisdiction of the ICJ, to which Japan has acceded generally, China has long refused to accept ICJ dispute resolution.[160] Genba emphasized that since Japan now holds the islands and has accepted the compulsory jurisdiction of the ICJ it would be open to China to bring its challenge before the court.[161] Professor Jerome Cohen has argued that such a route would offer several advantages to both sides, including a cooling off period and, during the long years when the matter was before the court, a context in which a settlement would be encouraged.[162]

Short of such an optimal path, there is wiggle room to diminish if not resolve this island dispute in several respects: first, as discussed above, a number of ICJ and other decisions in recent years have clarified the law, pointing to the likely outcome of an international legal decision on the merits;[163] second, progress suggested above for resolving the Dokdo/Takeshima dispute may offer even greater clarity on the international legal standards applicable to the

158. Han-yi Shaw offers an overview of the past developments and the respective claims to the islands and discusses crises that arose in 1970, 1978, 1990, and 1996. Han-yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., R.O.C., and Japan* 13-21 (Univ. of Md., Occasional Papers/Reprint Series, No. 3 (152), 1999).

159. Early 2013 proposals for discussions made to China's new leaders by the new leadership in Japan were met with an improved tone but also with caution. Nothing ever materialized. Teddy Ng, *Xi Jinping to Consider Summit with Japan over Diaoyu*, S. CHINA MORNING POST, Jan. 26, 2013, http://www.scmp.com/news/china/article/1136327/xi-jinping-consider-summit-japan-over-diaoyu-islands; Jane Perlez, *Chinese Leader Takes Conciliatory Tone in Meeting with Japanese Lawmaker*, N.Y. TIMES, Jan. 25, 2013, http://www.nytimes.com/2013/01/26/world/asia/chinese-leader-eases-tone-in-meeting-with-japan-envoy.html.

160. Koichiro Genba, *Japan-China Relations at a Crossroads*, N.Y. TIMES, Nov. 20, 2012, http://www.nytimes.com/2012/11/21/opinion/koichiro-genba-japan-china-relations-at-a-crossroads.html?_r=0.

161. *Id.* China has so far not met that challenge. While Beijing has never agreed to ICJ jurisdiction generally or specifically over such matters, there has been some speculation that its September 2012 attempt to assert sea boundary base lines to the disputed Diaoyu/Senkaku islands may signal efforts to lay the foundation for such litigation. Teddy Ng, *Beijing may seek Legal Solution to Diaoyus Row with Japan, Analysts say*, S. CHINA MORNING POST (Sept. 15, 2012, 12:00 AM). It should be further noted that when Japan acceded to the ICJ in 1958 it attached two reservations: (1) that any compulsory jurisdiction was subject to the other disputant having accepted compulsory jurisdiction and (2) that the subject under dispute be limited to situations or facts after 1958. Han-yi Shaw, *supra* note 158, at 128. Even if China accepted compulsory jurisdiction the second reservation would be sufficient for Japan to avoid jurisdiction in this case if desired. An effort to agree on such would seemingly have to be initiated by the PRC.

162. Jerome Cohen, *How Dangerous Are Sino-Japanese Tensions?*, CHINA FILE (Aug. 1, 2013), http://www.chinafile.com/how-dangerous-are-sino-japanese-tensions.

163. *See supra* Part IIIA.

Senkaku/Diaoyu dispute; third, China's rapid development and insatiable resource needs have brought more urgency to the matter, as has Japan's almost total reliance on imported energy, now increased as a result of diminished use of nuclear power; and, fourth, any future Japanese willingness to agree with the position already taken by the People's Republic of China ("PRC") and Taiwan that the Senkaku/Diaoyu Islands, as "rocks" under UNCLOS Article 121(3), are entitled only to a twelve mile territorial sea and not any resource zones—continental shelf or EEZ—would surely go a long way to reducing the importance of the dispute.

In regard to the latter point, as will be discussed in the next section below, any Chinese willingness to revise its own baselines *vis a vis* off-shore islands may facilitate such a Japanese move—as these various claims are likely viewed as bargaining chips in the overall dispute. By the same token, any Chinese perception that settlements in the East China Sea may positively impact its position in the South China Sea may encourage a more responsible effort to abandon some of its more extreme claims in favor of compromise.

On the merits, customary international law regarding such uninhabited island claims offers good potential to resolve the sovereignty part of the Senkaku/Diaoyu dispute. It seems likely, based on the various ICJ decisions noted above,[164] that the outcome would favor Japan, though this is not certain and only a proper tribunal could give a definitive answer. The historical title record is much thinner than that evident for Dokdo/Takeshima. As with Dokdo/Takeshima, the Japanese occupation and formal claim to the islands date to the turn of the 20th century and is based on occupation after its determination that the islands were then *terra nullius*.[165] Japan claims to have acquired title following a series of surveys between 1885 and 1895 during which the Japanese deemed there were no signs of Chinese control; they formally took control by a cabinet decision issued on January 14, 1895, by which they incorporated the islands into Japanese territory months before Taiwan was conceded under the Treaty of Shimonoseki.[166] This was followed by the granting of concessions to and patrolling of the islands from that date forward.[167]

Japan takes the view that either China had no historical title for lack of effective occupation or that any claim they had was abandoned.[168] A recent Japanese media report has turned up a 1950 document from the Chinese Foreign Ministry archive that acknowledged the island as Japanese territory, a document Japan alleges has spawned closure of relevant parts of the archive for vetting.[169]

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164. *See supra* Part IIIA.

165. AUSTIN, *supra* note 95, at 113.

166. *Id.*

167. *Id.*

168. *Situation of the Senkaku Islands*, JAPAN MINISTRY OF FOREIGN AFF. (Apr. 4, 2014), http://www.mofa.go.jp/a_o/c_m1/senkaku/page1we_000010.html.

169. Julian Ryall, *Beijing Cuts Access to Documents 'that Support Japan's Claim to Diaoyus'*, S. CHINA MORNING POST, Feb. 2, 2013, http://www.scmp.com/news/china/article/1141425/beijing-cuts-access-documents-support-japans-claim-diaoyus; *Curtailed Access to China's Diplomatic Archives Fuels Senkaku Conjecture*, JAPAN TIMES, Feb. 1, 2013,

Japan notes further that a 1953 article in the official *People's Daily,* five years after the founding of the PRC, described the Ryukyu Islands (Okinawa) as including the Senkaku Islands, which they feel concedes a lack of Chinese claim.[170]

The PRC position is that these islands are historical Chinese territory dating at least from the Ming Dynasty (1368-1644) when they were a navigational point in the coastal defense system of China and instrumental in its historical tributary relationship with the ancient Ryukyu kingdom in present day Okinawa.[171] Their claim is essentially based on discovery plus effective occupation. But only two acts of actual Chinese occupation before 1895 are cited by various sources: the islands' use in the 16th century as a navigational point in the coastal defense system and a one-off grant of ownership to a private party by Chinese imperial edict in 1893.[172] Austin argues that inclusion in a coastal defense system to contain piracy proves nothing since even high sea locations can be used for this navigational purpose; while he accepts that a grant of ownership is an official act, he doubts that this seeming one-off arrangement is sufficient to prove effective occupation.[173] A Japanese researcher has also cited a Ming Dynasty document in the official annals of the Ming Dynasty (Huangming Shilu) conceding that Chinese

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http://www.japantimes.co.jp/news/2013/02/01/national/history/curtailed-access-to-chinas-diplomatic-archives-fuels-senkaku-conjecture/#.VFcOGPTF_xo.

170. The *People's Daily* article cited by the Japanese Foreign Ministry is entitled "the battle of people in the Ryukyu Islands against U.S. occupation." Press Conference, Assistant Press Secretary, Ministry of Foreign Affairs of Japan (Oct. 2, 2012), *available at* http://www.mofa.go.jp/announce/press/2012/10/1002_01.html; *see also Old China Maps have no Mention of Diaoyu, Only after 1971 did Charts Lay Claim to Japan's Senkaku Islets*, JAPAN TIMES, Dec. 30, 2013, http://www.japantimes.co.jp/news/2013/12/30/national/old-china-maps-have-no-mention-of-diaoyu/#.UsGhvyfRDcx. The Ministry of Foreign Affairs ("MOFA") of Japan frequently updates its analysis. *See Situation of the Senkaku Islands*, *supra* note 168.

171. China's official position is laid out in its 2012 White Paper on Diaoyu Dao. STATE COUNCIL INFO. OFFICE OF CHINA, DIAOYU DAO, AN INHERENT TERRITORY OF CHINA (2012), *available at* http://news.xinhuanet.com/english/china/2012-09/25/c_131872152.htm. The White Paper especially emphasize missions to the Ryukyu Islands (Okinawa) during the Ming Dynasty to confer titles and accept tribute involved passage past Diaoyu Dao, as reflected in the mission records, the role of Diaoyu Dao in China's coastal defense, its inclusion on coastal maps, and the centuries of use by Chinese fishermen. Because of these tribute missions, Chinese nationalist commentators have gone so far as to challenge Japanese sovereignty over Okinawa. *China should 'reconsider' who owns Okinawa: academics*, BUS. STANDARD (May 8, 2013), http://www.business-standard.com/article/pti-stories/china-should-reconsider-who-owns-okinawa-academics-113050800900_1.html; Jane Perlez, *Calls Grow in China to Press Claim for Okinawa*, N.Y. TIMES, June 13, 2013, http://www.nytimes.com/2013/06/14/world/asia/sentiment-builds-in-china-to-press-claim-for-okinawa.html?pagewanted=all&_r=0. But China so far has merely allowed publication of such claims in the official press and has not made an official claim. *China not Disputing Japan Sovereignty over Okinawa*, REUTERS, June 2, 2013, http://uk.reuters.com/article/2013/06/02/uk-security-asia-okinawa-idUKBRE95101R20130602.

172. AUSTIN, *supra* note 95, at 164.

173. *Id.* at 165.

territorial claims did not reach beyond the Matsu Islands, and thus not as far off shore as the Senkaku/Diaoyu Islands.[174]

Chinese writer Han-yi Shaw attacks the Japanese claim that the islands were *terra nullius*, citing Japanese contemporary references to Chinese media reports of objections to Japanese surveys beginning in 1885 prior to perfecting the Japanese claimed annexation in 1895.[175] Such media reportage, however, would likely not be sufficient to establish title, and the cited instances of reaction to such surveys may tend to demonstrate the truthfulness of Japanese claims to perfect their title before their military occupation of Taiwan.[176] There are certainly a variety of historical claims on both sides that would best be sorted out and evaluated by the ICJ or another agreed arbitral tribunal empowered to resolve the dispute. There is also objection that the 1895 Japanese annexation was not publicized until very recently.[177]

The Chinese agree that the Japanese acquired full sovereignty of the islands in 1895, but argue this was part of the cession of Taiwan in the *Treaty of Shimonoseki*, which would give rise to the Japanese obligation to return the islands to China after World War II along with the return of Taiwan under the terms of the Japanese Instrument of Surrender and the San Francisco Peace Treaty.[178] Chinese ownership would first have to have existed for this obligation to arise.

Taiwanese scholar Tao Cheng has sought to bolster the Chinese historical title claim by an irredentist argument that the then contemporary standard of discovery and claim and not the more recent higher standard of "effective occupation" should apply, especially in the context of uninhabited territory.[179] The policy weakness in this argument is that it goes against the likely anti-colonialist foundation of the "effective occupation" principle,[180] that great powers not be able to travel the globe, "discover" territory and lay claim with little engagement. A slightly stronger Chinese policy argument, supported by Jon Van Dyke, is that Japan was essentially in its expansionary conquest phase when it claimed the Senkaku/Diaoyu Islands, that the Japanese cabinet decision, even if earlier than the treaty, was essentially part of the same expansionist activity culminating in the *Treaty of Shimonoseki*, and that such activity should not be recognized as separate and

174. *Chinese Document Contradicts Beijing's Claim to Senkakus*, YOMIURI SHIMBUN, Jan. 23, 2013,___http://www.asianewsnet.net/Chinese-document-contradicts-Beijings-claim-to-Sen-41822.html. Transcriptions of these records are reportedly available in the National Archives of Japan.

175. Han-yi Shaw, *The Inconvenient Truth Behind the Diaoyu/Senkaku Islands*, N.Y. TIMES, Sept. 19, 2012, http://kristof.blogs.nytimes.com/2012/09/19/the-inconvenient-truth-behind-the-diaoyusenkaku-islands/?smid=tw-share.

176. *See generally* Han-yi Shaw, *supra* note 158.

177. *Id.*

178. *Id.*; Cheng, *supra* note 86, at 259-60.

179. *See* Cheng, *supra* note 86, at 224-26. Unryu Suganuma has expressed sympathy for this irredentist argument in respect of claims from the Asian millennia of *Pax Sinica*, but suggests that Chinese abandonment after their ancient discovery and claim is an open question. *See* UNRYU SUGANUMA, SOVEREIGN RIGHTS AND TERRITORIAL SPACE IN SINO-JAPANESE RELATIONS: IRREDENTISM AND THE DIAOYU/SENKAKU ISLANDS 101-115 (Joshua A. Fogel ed., 2000).

180. *See generally* Cheng, *supra* note 86.

distinct.[181] If accepted, this would strengthen the case that the islands should have been restored to the ROC (Taiwan) after the war. The difficulty is that this claim may simply be counterfactual, if China lacked a valid historical title and the Japanese can prove a sufficient explanation for the 1895 cabinet decision.

Japan disputes both the claim that the Senkaku/Diaoyu Islands were covered by the *Treaty of Shimonoseki* and the post-war obligation to restore the islands to China. Japanese officials argue that the Japanese cabinet decision annexing the islands occurred three months ahead of the *Treaty of Shimonoseki* and was unrelated thereto.[182] They point out that there was no reference to the islands either in the 1895 *Treaty of Shimonoseki* or the *San Francisco Peace Treaty* provisions respecting restoration of Taiwan.[183] Senkaku/Diaoyu Islands are also at some distance from Taiwan, arguing against any presumption of inclusion.[184] Accordingly, Japan argues that Senkaku/Diaoyu is not included in the reference from the *Cairo Declaration* incorporated in the *San Francisco Peace Treaty* requiring that "all territories Japan has stolen . . . be restored to the Republic of China."[185]

By Article 3 of the 1951 San Francisco Peace Treaty, Japan further agreed to temporary "exercise of all powers of administration, legislating and jurisdiction" by the United States for the Ryukyu Islands south of twenty-nine degrees north, under which the U.S. took possession of Okinawa and the remaining Ryukyu Islands, as well as the Senkaku/Diaoyu Islands.[186] The U.S. did not return these islands to Japan until 1972 under the Okinawa Reversion Agreement.[187] China did not protest the failure to "return" these islands to China along with Taiwan (returned right after World War II) until 1970—after a 1969 U.N. study reported possibly large oil deposits[188]—this may be most damning to the Chinese

181. VAN DYKE, *supra* note 76, at 60-62. Jerome Cohen and Jon Van Dyke have emphasized that Japan fully knew of the Chinese historic claim when they began to take an interest in the islets in 1885, noting Japanese acknowledgments during the time and the stealth of its cabinet decision, which was not made public until after World War II. Jerome A. Cohen & Jon M. Van Dyke, *Lines of Latitude*, S. CHINA MORNING POST, Nov.10, 2010, http://www.cfr.org/japan/lines-latitude/p23364. They also express concern about Japan's exaggerated EEZ claim. *Id.*

182. AUSTIN, *supra* note 95, at 168-70.

183. *Id.*

184. 355 kilometers. Distance from Senkaku Islands from Taiwan, GOOGLE MAPS (follow "Get Directions" hyperlink; then search "A" for Taiwan and search "B" for "Senkaku Islands"; then follow "Get Directions" hyperlink).

185. AUSTIN, *supra* note 95, at 170. After the San Francisco Peace Treaty, the ROC on Taiwan entered a peace treaty with Japan that largely reaffirms the provisions of the San Francisco Peace Treaty and expressly nullifies pre-1941 treaties, including the *Treaty of Shimonoseki*. *See* Treaty of Peace Between the Republic of China and Japan, China-Japan, Apr. 28, 1952, 139 U.N.T.S. 3. This ROC-Japan Peace Treaty makes no mention of Senkaku/Diaoyu. *See id.* It was promptly renounced by the PRC.

186. Treaty of Peace with Japan, *supra* note 133, art 3.

187. *See* Agreement between the United States of America and Japan Concerning the Ryukyu Islands and the Daito Islands, U.S.-Japan, June 17, 1971, 23 U.S.T. 447.

188. AUSTIN, *supra* note 95, at 163.

position.[189] After such oil discovery, and just as the islands were slated for return to Japan, China finally filed its protest in 1970.[190] Both the ROC and PRC likewise objected to the *Okinawa Reversion Agreement* in 1971 before the reversion was completed.[191] The first formal point of protest was in 1970; it is when the legal dispute finally crystallized, and would thus likely be viewed as the critical date.[192] As such, Japan's continuous occupation, including the placement by Japanese citizens of some lighthouse structures, and frequent patrols since that date would not prove ownership.[193] Likewise, the Japanese government's recent decision to purchase three of the islands from a private title-holder should not have any effect on the merits and would not seem to warrant the sharp response it received.[194]

As is frequently true of remote uninhabited islands, the historical title claims are somewhat murky, though this seems to favor Japan with both the most recent concrete claim and current occupation. The weak link in Japan's claim, as discussed in the next section, is its failure to proclaim that it will not claim resource zones or strait base lines to the islands under UNCLOS. As an archipelagic state under UNCLOS Article 47(1), Japan may typically seek to draw strait baselines to the outer point of its outer islands.[195] On the other hand, if this is merely an uninhabited rock, as specified in UNCLOS Article 121(3), then the islands should not be entitled to an EEZ or continental shelf.[196] That the PRC (and Taiwan) traditionally proclaimed that Senkaku/Diaoyu was not entitled to such resource zones may be some indication of Beijing's assessment of the strength of their claim, given that the PRC has not been shy about making extreme maritime claims in the South China Sea.[197] Such acknowledgement by the PRC also opens the door for Japan to climb down on the issue. Since the PRC is unlikely to agree to a dispute resolution process or formally surrender its claim, without a clear indication from Japan on the resource boundary issue the Senkaku/Diaoyu sovereignty and related resource boundary issues seem likely to remain mired in

189. *Id.*

190. *Id.*

191. *Statement of the Ministry of Foreign Affairs of the People's Republic of China*, 15 PEKING REV. 12, 12 (1972).

192. *See* AUSTIN, *supra* note 95, at 40.

193. *Id.* at 9, 40-41; *see also* Island of Palmas (U.S. v. Neth.), 11 R.I.A.A. 831 (Perm. Ct. Arb. 1925).

194. *Japan to Bring Senkaku Islands Under State Control*, HOUSE OF JAPAN (Sept. 5, 2012), http://www.houseofjapan.com/local/japan-to-bring-senkaku-islands-under-state-control.

195. UNCLOS, *supra* note 6, art. 47, ¶ 1.

196. *Id.* art. 121, ¶ 3. Bernard Oxman argues this may not be relevant when the rock in question is already within an EEZ, essentially reducing the rock's resource zone implications to it role under the rules on baselines or archipelagic lines. Bernard H. Oxman, *On Rocks and Maritime Delimitation*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (Mahnoush Arsanjani et al. eds., 2010).

197. Recent attempts in September 2012 by the PRC to draw strait baselines around the Diaoyu/Senkaku Islands were roundly criticized by the U.S. *U.S. Defense Department criticizes China's claims to Senkaku Islands*, JAPAN NEWS, May 8, 2013, http://sinocism.us5.list-manage1.com/track/click?u=f18121c5942896d3a87491249&id=ced0683c1f&e=654fcbfcc5.

dispute. If that constraint was removed there may be room for forward movement regarding the broader maritime sovereignty and resource claims.

If the resources at stake were reduced by virtue of a Japanese climb-down (to claim only territorial waters) on the resource issue, China may want to reconsider the value of some form of arbitration. When asked to explain the mention of international law and dispute resolution in the September 2012 speech to the U.N. General Assembly by the then Japanese Prime Minister, Japanese officials suggested that, unlike Dokdo/Takeshima, Japan is in full possession of the Senkaku/Diaoyu Islands, such that they have no reason to approach the ICJ.[198] This statement appears to suggest that if China were to take the case to the ICJ Japan may agree to appear, though this is not expressly said.

As with the above suggestions regarding Japan's possible handling of Dokdo/Takeshima, China may want to consider the value of positive precedent in regard to its relatively stronger claim to the Paracel Islands and parts of the Spratlys in the South China Sea.[199] A proper dispute resolution process may also allow both governments time to climb down from the nationalistic pressure they now experience over this dispute. A third option would be to designate the island a special international resource protection area without resolving the sovereignty issue. Japanese New Komeito Party leader Natsuo Yamaguchi, during a 2013 official visit to Beijing, offered the more limited proposal of a no-fly zone around the islands.[200]

VI. ASSOCIATED RESOURCE DISPUTES IN THE SEA OF JAPAN AND THE EAST CHINA SEA

Without question, the tension that pervades these disputes over remote uninhabited islands is fueled by the competition for associated resources, though nationalistic sentiments about sovereignty may drive civil society pressures. While not all the resource boundary disputes in the relevant sea areas under discussion bear a direct relationship to the uninhabited island disputes now under discussion, it is undoubted that some seemingly indirect extraordinary claims regarding baselines or the continental shelf may serve as bargaining chips that make settlement of both the island disputes and the maritime resource boundary disputes difficult.

While the spirit of recent years has been to set aside the island sovereignty disputes and attempt to agree on joint resource development zones, this has proven difficult on several levels: first, many resource rights in surrounding seas are

198. Press Conference, *supra* note 170, ¶ 6.

199. In his comprehensive study Greg Austin favored the Chinese position on the Paracel Islands, and part of the Spratlys. AUSTIN, *supra* note 95, at 98-158. China has to date essentially refused to entertain discussions on the Paracel Islands. *See* Greg Torode & Minnie Chan, *China Refuses to Yield on Paracels*, S. CHINA MORNING POST, Dec. 12, 2010, http://www.scmp.com/article/733189/china-refuses-yield-paracels.

200. *See* Teddy Ng, *Japanese Politician Calls for Disputed Islands no-fly Zone*, S. CHINA MORNING POST, Jan. 22, 2013, http://www.scmp.com/news/china/article/1133325/japanese-politician-calls-disputed-islands-no-fly-zone.

thought to directly depend on the territorial sovereignty rights to the uninhabited islands; second, at the same time, recent precedent before the UNCLOS Commission on the Limits of the Continental Shelf raises doubts about resource claims for such uninhabited islands;[201] third, perhaps of greater importance, parties may seek to leverage these island claims against the more extreme claims of their resource competitor respecting base lines or the continental shelf; and, fourth, a background of security concerns and nationalism may make compromise on such territorial sovereignty disputes especially difficult.[202]

A. Japan-Republic of Korea Maritime Disputes

In the resource area, the Japan-South Korea relationship again offers the most promise for moving forward. Though saddled with a difficult post-colonial and post-war legacy of distrust, robust trade and shared security arrangements in recent decades have fashioned a trade and security partnership less saddled with the tense competition evident in the Sino-Japanese case. Except for some recent flare-ups of tension over Japan's war-time record, shared interest and alignments have historically fostered a degree of moderation over resource claims. Both parties have not appeared to openly attach EEZ or continental shelf resource claims to their Dokdo/Takeshima territorial claims—though this is not absolutely clear, given Japan's tendency to attach such resource zone claims to nearly all small islands in its possession.[203] The recent UNCLOS Commission Recommendation, rejecting a Japanese claim to an EEZ for an unoccupied island to the East of Japan, would weaken further any effort to claim an EEZ in such context.[204] South Korea has also sought to match the Chinese natural prolongation argument when it comes to the continental shelf toward Japan, but one may question how serious South Korea can ultimately be about this in the face of the contrary UNCLOS jurisprudence noted above.

With a somewhat less tense relationship over past years, the parties have reached a number of agreements. They were able in 1974 (which came into force in 1978, well before UNCLOS) to reach two agreements concerning the continental shelf: one is the only boundary agreement ever reached in Northeast

201. COMM'N ON THE LIMITS OF THE CONTINENTAL SHELF, SUMMARY OF RECOMMENDATIONS OF THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF IN REGARD TO THE SUBMISSION MADE BY JAPAN ON 12 NOVEMBER 2008, para. 20 (2012), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/com_sumrec_jpn_fin.pdf [hereinafter *Commission Recommendation*]. Regarding the uninhabited island of Okinotorishima the Commission, in the face of Chinese and South Korean objection to Japan's resource claims, refused to make a recommendation. While this set no precedent on the substantive issue, which presumably would have to be submitted to a proper tribunal, it did offer a UN based statement of skepticism regarding such claims. *See UN Approves Japan's Claim on Wider Seas*, YOMIURI SHIMBUN/ASIA NEWS NETWORK, Apr. 29, 2012, http://www.asiaone.com/News/AsiaOne%2BNews/Asia/Story/A1Story20120429-342721.html.

202. South Korea has resource boundary disputes with China and even more difficult and volatile maritime boundary issues with North Korea, which are beyond the scope of the present essay.

203. VAN DYKE, *supra* note 76, at 51-52.

204. *See Commission Recommendation*, *supra* note 201.

Asia, delimiting a median line continental shelf boundary in the northern part of the Korea Strait (named the "Tsushima Strait" in Japan);[205] the other is the 1974 (came into effect in 1978) joint development agreement for areas of the East China Sea south of Cheju Island bounded by the outer limits of their overlapping claims.[206] China has objected that the resultant joint development zone overreaches into Chinese areas and it remains for the two partners to reach agreement with China.[207] The Joint Development Zone agreement provides for joint development of resources from the continental shelf in an approximately 24,000 square nautical mile area where the parties' continental shelf claims overlap in the East China Sea below Cheju Island and has a mandatory period of fifty years.[208]

The resultant Joint Development Zone is mostly on the Japanese side of the median because Japan is claiming up to the median line and South Korea is claiming natural prolongation beyond the median line. This generous pre-UNCLOS Japanese agreement may have inspired China to demand similar concessions in its resource dispute with Japan, even though UNCLOS now offers no support in this context for China's natural prolongation argument. With the respective continental shelf boundaries between Japan and South Korea not yet resolved this seeming unfairness may require future adjustment in the joint development zone if a boundary settlement is ultimately reached around the median line approach now favored under UNCLOS. North of the Korea Strait, below any area where North Korean maritime claims are implicated, equidistant lines should adequately deal with the resource boundary disputes in the Sea of Japan, once the Dokdo/Takeshima issue is resolved.

In 1998, Japan and South Korea also reached a fisheries agreement, which seeks to set aside boundary disputes and accommodate differences over Dokdo/Takeshima.[209] The agreement is a "provisional agreement" under UNCLOS Article 74(3) pending final determination of maritime boundaries and should have little effect on the territorial or maritime disputes now pending. Since UNCLOS would favor fisheries access agreements to properly maintain fishing stock in EEZs,[210] fishery agreements are more easily achieved and may be sustainable even after resolution of boundary issues. Japan's excessive use of

205. Choon-Ho Park, *Seabed Boundary Issues in the East China Sea*, *in* SEABED PETROLEUM IN NORTHEAST ASIA: CONFLICT OR COOPERATION 19, 19-22 (Selig S. Harrison ed., 2005).

206. *Id.* at 19-20.

207. *Id.* at 21.

208. *Id.* at 20.

209. Agreement Between Japan and the Republic of Korean Concerning Fisheries, Japan-S. Kor., Nov. 28, 1998, I-48295. *See* Pilkyu Kim, *supra* note 86, at 28-30.

210. *See* Marcos A. Orellana, *EEZ Fisheries Access Arrangements and the WTO Subsidies Agreement*, *in* PROMOTING SUSTAINABLE FISHERIES, THE INTERNATIONAL LEGAL AND POLICY FRAMEWORK TO COMBAT ILLEGAL, UNREPORTED AND UNREGULATED FISHING (Mary Ann Palma et al. eds., 2010); U.N. ENVIRONMENT PROGRAMME, UNEP IN 2007 6 (2007), *available at* http://www.unep.org/PDF/AnnualReport/2007/AnnualReport2007_en_web.pdf.

strait baselines continues to pose some difficulty in Japan-South Korean discussions in this regard.[211]

B. China-Japan Maritime Disputes

The Sino-Japanese maritime resource boundary discussions are far more difficult and clearly implicate the Senkaku/Diaoyu Islands dispute. Japan has long unilaterally designated a median line in the East China Sea between China and Japan as the appropriate boundary for both the EEZ and the continental shelf resources zones.[212] The most difficult obstacle to any effort to reach an equitable solution has been the Chinese claim to nearly all of the continental shelf between China and the Japanese islands on the basis of natural prolongation.[213] As discussed above, recent case law in the ICJ clearly makes such an extreme claim untenable for opposite states within 400nm of each other.[214]

Another major obstacle to mutual accommodation is the tendency of both China and Japan to make excessive use of strait baselines. Before the parties can start discussion around an initial median line, there must be some consensus on the base lines from which the median line would be drawn. Since Japan's baselines to the south will be those typical of an archipelago, along the Ryukyu Islands, Japan is expected to use strait baselines to the outermost points of the outermost island.[215] Such lines should generally not exceed 100nm and "should not depart to any appreciable extent from the general configuration of the archipelago."[216] This would seemingly render any attempt to draw a strait baseline from the Japanese Ryukyu Islands to the uninhabited Senkaku/Diaoyu Islands inappropriate.

The most egregious current Chinese baseline claim should also be dropped: China's strait baselines to the uninhabited high tide elevation called Dongdao Island some seventy miles offshore from Shanghai.[217] It is possible that such an extraordinary baseline claim is envisioned as a bargaining chip. Perhaps China may be persuaded to drop this baseline claim if Japan disavowed any claim to any

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211. VAN DYKE, *supra* note 76, at 44-45.

212. *See* Peterson, *supra* note 92; Kosuke Takahashi, *Gas and Oil Rivalry in the East China Sea*, ASIA TIMES ONLINE (July 27, 2004), http://www.atimes.com/atimes/Japan/FG27Dh03.html.

213. The Chinese Foreign Minister Yang Jiechi stated, "On the East China Sea delimitation, China has never and will not recognize the so-called 'median line' as advocated by Japan. China upholds the principle of natural prolongation to solve the delimitation issue of the East China Sea continental shelf." Chinese Agency, *Tentative Translation of FM's Answers on East China Sea Issue*, XINHUA NEWS AGENCY, June 24, 2008, *quoted in* Peterson, *supra* note 91, at 454, n.137. China has submitted this continental shelf prolongation to the U.N. in a submission entitled "Partial Submission Concerning the Outer Limits of the Continental Shelf beyond 200nm in the East China Sea." *China Makes U.N. Appeal for Maritime Claim*, UPI, Dec. 18, 2012, http://www.upi.com/Top_News/Special/2012/12/17/China-makes-UN-appeal-for-maritime-claim/UPI-60871355720880/.

214. *See* VAN DYKE, *supra* note 76, at 58; Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, at 35, ¶ 39 (June 3).

215. UNCLOS, *supra* note 6, art. 47, ¶ 1.

216. *Id.* art. 47, ¶¶ 2-3.

217. *See* BUREAU OF OCEAN AND INT'L ENVTL. AND SCIENTIFIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 117, STRAIGHT BASELINE CLAIM: CHINA (1996).

extended baselines from the Ryukyu Islands to Senkaku/Diaoyu, as well as claim to any resource zones around the Senkaku/Diaoyu Islands. Both claims would appear untenable under UNCLOS as currently interpreted. If proper baselines were agreed upon and the parties could identify an initial equidistant or median line, they would still be left with the question of proportionality.[218] This is important, because the larger hydrocarbon reserves are thought to be on the Japanese side of the median line.[219]

As discussed above, a tribunal trying to resolve the Sino-Japanese maritime boundary dispute would likely begin with equidistant or median lines and then adjust such lines to achieve proportionality between the relative length of the two opposing coastlines and the resource zone allocated.[220] The actual Chinese coast is clearly much longer than the Japanese coastal areas along the Ryukyu Island chain, which covers most of the area opposite China's coast. Using its natural prolongation claim, China has sought to claim all the continental shelf to the Eastern side of the deep Okinawa Trough that borders the Ryukyu Islands.[221] China is thought to be motivated in this regard because the petroleum deposits in the Okinawa Trough are reportedly the richest in the East China Sea.[222] Using the appropriate equitable solution and proportionality standards, one suspects the boundary line would still fall on the Western side of the Okinawa Trough toward China, though a proportionality analysis would bring more resources on to the Chinese side of the boundary than a simple median line.[223]

In spite of these interconnected difficulties, China and Japan in 1997 reached a fisheries agreement, covering areas above twenty-seven degrees north, from a point about one hundred kilometers north of the Senkaku/Diaoyu Islands.[224] This fisheries agreement is rather comprehensive, identifying four fishing zones, including undisputed territorial seas, exclusive fishing zones within EEZs, shared zones in EEZs straddling median lines, and high seas; there is also provision for mutual access to EEZs, fishing quotas, a Joint Fisheries Commission and conservation measures.[225] The exclusion of the Senkaku/Diaoyu area from coverage has left a big gap to generate troubled disputes, such as was evident in 2010 over Japanese arrest of Chinese fishermen for ramming the Japanese patrol boat near the Senkaku/Diaoyu Islands and again in the arrest of 13 occupiers in 2012.[226]

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218. *See* Continental Shelf, 1985 I.C.J. 13.

219. Choon-Ho Park, *supra* note 205, at 5-6.

220. Continental Shelf, 1985 I.C.J. 13.

221. VAN DYKE, *supra* note 76, at 58-60.

222. Choon-Ho Park, *supra* note 205, at 6.

223. VAN DYKE, *supra* note 76, at 58-60.

224. *See* Zou, *supra* note 79, at 132-40; Nobukatsu Kanehara & Arima Yutaka, *Japan's New Agreement on Fisheries with the Republic of Korea and the People's Republic of China*, 42 JAPANESE ANN. OF INT'L L. 1, 1-31 (1999); ZHIGUO GAO & JILU WU, KEY ISSUES IN THE EAST CHINA SEA: A STATUS REPORT AND RECOMMENDED APPROACHES 5, *available at* http://www.wilsoncenter.org/sites/default/files/Zhiguo_Gao_and_Jilu_Wu.pdf.

225. Zou, *supra* note 79, at 132-40.

226. *See* Tanaka Sakai, *Rekindling China-Japan Conflict: The Senkaku/*

Agreement over the valuable petroleum deposits has proven much more difficult due to the value of the resources involved and the troubled boundary delimitation disputes noted above. China had generally sought to have any joint development zones located entirely on the Japanese side of Japan's proposed median line, arguing that the continental shelf on the East side of the line is the only part in dispute—tracking more or less the pre-UNCLOS resource zone as was agreed between Japan and South Korea.[227] Moderate progress was achieved when China and Japan announced on June 18, 2008, in separate press conferences, a "principled consensus" to jointly explore and develop natural resources in a 2,700 square kilometer area in the East China Sea that straddles Japan's proposed median line well to the north of Senkaku/Diaoyu Islands.[228] The arrangement also appears to authorize Japanese corporations to invest in the existing Chinese-operated Chunxiao oil and gas field bordering the median line on the Chinese side.[229] The stated objectives of this "principled consensus" have not been implemented, and Japan continues to protest that the Chinese drilling near the median line will siphon off petroleum from the Japanese side.[230] Given the peculiarities of the separate announcement and continued discussions over full implementation, there is good reason to doubt that the "principled consensus" rises to the level of an actual agreement. As indicated in the Japanese press statement, the parties appear to view it as a principled consensus to work toward realizing an enforceable agreement.[231] It seemingly envisions joint resource exploration and possible, though yet unrealized, shared production.[232] In fact, continued discussions broke down during the 2010 dispute over the Japanese arrest of Chinese fishermen near the Senkaku/Diaoyu Islands.[233]

Though the process has been too opaque for a clear reading, it appears the chief obstacles to further agreement have been the problematic baselines, China's excessive natural prolongation claim regarding the continental shelf and the dispute over Senkaku/Diaoyu, especially Japan's failure to formally acknowledge

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Diaoyutai Islands Clash, ASIA-PACIFIC J.: JAPAN FOCUS (Sept. 27, 2010), http://japanfocus.org/-Tanaka-Sakai/3418.

227. *See* SUSUMU YARITA, TOWARD COOPERATION IN THE EAST CHINA SEA 2 (2005), *available at* http://www.wilsoncenter.org/sites/default/files/Susumu_Yarita.pdf (discussing how the pre-1982 Japan-South Korean agreement plays a part in China's attempt to advance such seemingly unjustified claim).

228. Press Release, Ministry of Foreign Affairs of the People's Republic of China, China and Japan Reach Principled Consensus on East China Sea Issue (June 18, 2008), *available at* http://nz.china-embassy.org/eng/xw/t466729.htm [hereinafter Japan Press Release]; Joint Press Conference, Ministry of Foreign Affairs of Japan, Minister of Foreign Affairs Masahiko Koumura and Minister of Economy, Trade and Industry Akira Mari, *Regarding Cooperation Between Japan and China in the East China Sea* (June 18, 2008, 6:25 PM), *available at* http://www.mofa.go.jp/announce/fm_press/2008/6/0618.html.

229. Japan Press Release, *supra* note 228.

230. *See* Choon-Ho Park, *supra* note 205, at 3-5; Mari Yamaguchi, *Japan Protests to China over Undersea Gas Drilling*, ASSOCIATED PRESS, Feb. 1, 2012, http://news.yahoo.com/japan-protests-china-over-undersea-gas-drilling-022110278.html.

231. Japan Press Release, *supra* note 228. *See* Peterson, *supra* note 91, at 465-70.

232. Japanese Press Release, *supra* note 228.

233. Fackler, *supra* note 8.

that it would not be entitled to resource zones and extended baselines. Agreement on baselines should be generally achievable through give and take with reference to UNCLOS. On the continental shelf claims, China has historically argued that any provisional cooperative agreement for joint development under UNCLOS should only apply to the Japanese side of the median line since that is the only disputed area.[234] This is extraordinary in that China is using an excessive indefensible claim against the relatively moderate Japanese continental shelf claim to effectively say, what is mine is mine and what is yours is ours. That the rather limited "principled consensus" to date involves resource areas on both sides of the median line perhaps reveals that the Chinese understand how untenable their more extreme natural prolongation claim to the entire continental shelf is.

On Senkaku/Diaoyu resource claims, China has already acknowledged that the islands do not warrant resource zones, though it seemingly has not conceded the strait baseline point should it prevail in its claim to the islands. If there is any room for movement it would seem that Japan might be persuaded to abandon resource and baseline claims over Senkaku/Diaoyu if China were to drop its excessive baseline claim for Dungdao Island or other behind-the-scenes "bargaining chips." The above noted UNCLOS Commission Recommendation rejecting a similar claim for an extended continental shelf would seem to make this shift tenable.[235]

In general, similar strait baseline excesses on both sides could be modified in any deal to achieve equity. In doing so, both sides would not realistically be giving up anything and would simply be following established international law, as required by UNCLOS. If the parties could then quietly begin discussions of resource boundaries based on the established UNCLOS rules regarding equidistance and proportionality, it would seem that an equitable solution would be within reach over the entire East China Sea. Japan's dropping of any resource zone claims for the Senkaku/Diaoyu Islands might be the proverbial log to be gently pulled out to relax the impasse. The Senkaku/Diaoyu Islands should only be entitled to a territorial sea of 12nm or less.

C. Security Concerns

The seas as a resource also include the maritime role in security and the question of military passage.[236] In the coastal resource zones, the coastal state usually has complete control over living and nonliving resources and can limit marine scientific research, but other states otherwise retain normal rights associated with the high seas and air passage over international waters.[237] In this regard, UNCLOS protects freedom of navigation for military and commercial passage by ships of other countries through such zones, an issue about which

234. YARITA, *supra* note 227.

235. *See Commission Recommendation*, *supra* note 201.

236. *Id.* at 26; Y.H. Song, *China and the Military Use of the Ocean*, 21 OCEAN DEV. AND INT'L L. 221, 226 (1990).

237. UNCLOS, *supra* note 6, arts. 56, 58.

China has some objections.[238] Associated military surveillance activities are usually thought to be protected activity, as it is allowed on the high seas more generally.

China has especially objected to U.S. military activities in the area,[239] including hydrographic surveys by U.S. military ships in China's EEZ, surveys that the U.S. argues are in furtherance of submarine navigation.[240] China characterizes such passage and seabed surveys as marine scientific research, which would require China's permission under UNCLOS.[241] While participating in the Rim of the Pacific ("RIMPAC") maritime exercise, China was reported to be spying on the so-called "Rim Pac" exercises off Hawaii in the U.S. EEZ, which raises the question whether China will continue to object to surveillance activity in its EEZ.[242] China's recent proclamation of an ADIZ across much of the area between China and Japan beyond China's EEZ is thought to have dual purpose of seizing control over the air above disputed islands and also constraining surveillance flights through the area.[243] The U.S. argues the naval sea and air hydrographic and military surveys are permitted under in the UNCLOS convention and that the surveillance flights above international waters are unrestricted.[244] On that basis, the U.S. likewise did not object to the Chinese ship surveillance in the U.S. EEZ during RIMPAC.

This question of military passage and surveillance has caused confrontation between the U.S. and China several times in recent years.[245] Such incidents have included a Chinese air crash and the forced landing of a U.S. plane on Hainan

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238. *Id.* § 3.

239. Mark Valencia, *China and US must agree on rules for waters in exclusive economic zone*, S. CHINA MORNING POST, Aug. 31, 2013, http://www.scmp.com/comment/insight-opinion/article/1300695/china-and-us-must-agree-rules-waters-exclusive-economic-zone ("[T]he deployment and use of any type of scientific research equipment in any area of the marine environment shall be subject to the same conditions . . . for the conduct of marine scientific research in any such area.").

240. *Id.*

241. *Id.*; UNCLOS, *supra* note 6, art. 21.

242. *China defends dispatch of spy ship to monitor US-led naval drills off Hawaii*, S. CHINA MORNING POST, July 21, 2014, http://www.scmp.com/news/world/article/1556956/chinese-spy-ship-monitors-us-led-naval-drills-hawaii; Andrew Erickson & Emily de La Bruyere, *Crashing Its Own Party: China's Unusual Decision to Spy on Joint Naval Exercises*, WALL ST. J., July 19, 2014, http://blogs.wsj.com/chinarealtime/2014/07/19/crashing-its-own-party-chinas-unusual-decision-to-spy-on-joint-naval-exercises/?mod=chinablog; Kristine Kwok, *China hostility to surveillance may lessen as it becomes a maritime power*, S. CHINA MORNING POST , Jan. 6, 2014, http://www.scmp.com/news/china/article/1398413/china-hostility-surveillance-may-lessen-it-becomes-maritime-power.

243. *See* Jun Osawa, *China's ADIZ over the East China Sea: A "Great Wall in the Sky"?*, BROOKINGS (Dec. 17, 2013), http://www.brookings.edu/research/opinions/2013/12/17-china-air-defense-identification-zone-osawa.

244. Valencia, *supra* note 239.

245. Li Jing, *United States and Chinese Warships nearly Collide in South China Sea*, S. CHINA MORNING POST, Oct. 17, 2014, http://www.scmp.com/news/china/article/1380830/united-states-and-chinese-warships-nearly-collide-south-china-sea.

Island in 2001,[246] Chinese damage to sonar equipment on the *U.S.S. Impeccable* engaged in monitoring of Chinese submarines in the EEZ off Hainan Island in 2009,[247] and the controversy over joint US-South Korean exercises in the Yellow Sea in 2010, where the Chinese objected to the presence of U.S. warships.[248] That the U.S. has defense agreements with nearly all countries surrounding Senkaku/Diaoyu Island and that it has reiterated the inclusion of these islands as part of its commitment to defend Japanese administered territory emphasizes the connection of disputes over the islands and resources to the U.S. perception of overall security volatility in the area.[249]

The combination of the U.S. "pivot" toward Asia, China's increased projection of power in the region, and the expanded military buildup by Japan and the Philippines predicts continued volatility over these security issues.[250] U.S. involvement may serve to check Chinese military aggression but it also adds increased risk of miscalculation.[251] That China engages in increased military activity offshore from Japan, the Philippines, and Vietnam, and is sometimes suspected of using poorly identified fishing boats in security roles, adds to the volatility of its various island disputes.[252]

Some analysts believe China's heightened belligerence, especially with Japan, may reflect the leadership's aim to create a more confrontational environment in which to whip China's largely untested PLA into shape.[253] Japanese Admiral Fumio Ota sees Chinese military intrusion into Japanese EEZs, in combination with the lack of transparency concerning China's military build-up and activities, as having the highest risk of occurrence among Sino-Japanese conflict risks.[254]

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246. Elizabeth Rosenthal, *US Plane in China After it Collides with Chinese Jet*, N.Y. TIMES, Apr. 2, 2001, http://www.nytimes.com/2001/04/02/world/us-plane-in-china-after-it-collides-with-chinese-jet.html.

247. Jane Perlez, *American and Chinese Navy Ships Nearly Collided in South China Sea*, N,Y. TIMES, Dec. 14, 2013, http://www.nytimes.com/2013/12/15/world/asia/chinese-and-american-ships-nearly-collide-in-south-china-sea.html.

248. Jerome A Cohen & Jon M. Van Dyke, *Limits of Tolerance*, S. CHINA MORNING POST, Dec. 7, 2010, http://www.cfr.org/china/limits-tolerance/p23593. In December 2002 China even passed a law requiring Chinese approval of mapping and surveying activities in its EEZ. *Id.*

249. Cary Huang, *Why China is wary of US stepping in over Diaoyus*, S. CHINA MORNING POST, Nov. 1, 2010, http://www.scmp.com/article/729128/why-china-wary-us-stepping-over-diaoyus; Greg Torode, *US Naval Chief Warns of 'Winds of Change'*, S. CHINA MORNING POST, Sept. 13, 2010, http://www.viet-studies.info/kinhte/Winds_of_Change.htm.

250. Stephen M. Walt, *Explaining Obama's Asia policy*, FOREIGN POL'Y, Nov. 18, 2011, http://walt.foreignpolicy.com/posts/2011/11/18/explaining_obamas_asia_policy.

251. Chi-Chi Zang, *China Objects to US Offer Over Disputed Islands*, ASSOCIATED PRESS, Nov. 3, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/02/AR2010110200908.html; Cheng Guangjin, *Beijing Rejects US Offer to Host Diaoyu Talks*, CHINA DAILY, Nov. 3, 2010, http://usa.chinadaily.com.cn/2010-11/03/content_11495897.htm.

252. Edward Wong, *Chinese Civilian Boats Roil Disputed Waters*, N.Y. TIMES, Oct. 5, 2010, http://www.nytimes.com/2010/10/06/world/asia/06beijing.html?_r=0.

253. John Garnaut, *Leader's Ploy More than Naval Gazing*, SYDNEY MORNING HERALD, Apr. 27, 2013, http://www.smh.com.au/world/leaders-ploy-more-than-naval-gazing-20130426-2ijxx.html.

254. Fumio Ota, *Conflict Prevention and Confidence Building Measures Between Japan and China*, INT'L ASSESSMENT AND STRATEGY CTR. (Jan. 5, 2009),

Query whether this lends support to Japanese suspicions about greater Chinese ambitions beyond the Senkaku/Diaoyu Islands to the Ryukyu Islands (Okinawa), which China treated as a tributary kingdom for five hundred years before the Japanese annexation in 1879?[255]

VII. CONCLUSION

The above overview has exposed the two sets of island disputes as a cause that has soured relations between the three protagonists (along with the ROC on Taiwan and the United States) for the last half-century. This article has sought to show that a series of contingent relationships between various island and resource claims have led the parties to cling to various claims as bargaining chips in a dispute process defined by bluster and excess. As long as the parties were content to defer resolution of these disputes for another time as they set about the process of trade and development this standoff or log-jam may have been optimal. But with increasing resource scarcity brought on by rapid economic development in the region and increasing security ambitions by a rapidly developing China, this standoff has become untenable and a serious security risk. If one adds to this mix the nationalistic passions that these contests over sovereignty have caused the danger of miscalculation leading to military confrontation becomes even more evident.

The good news is that these problems are solvable far short of military confrontation. Since the parties engaged these issues in the early 1970s, considerable international legal principles have developed either through treaty law or international case precedent in the ICJ. Such legal principles offer the parties substantial guidance on nearly all of the contentious issues, including: appropriate baseline delineation,[256] the use of the equidistant principles,[257] proportionality,[258] equitable boundaries for maritime resources,[259] the standards for territorial disputes and historical title in the context of disputes over uninhabited islands,[260] and the

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http://www.strategycenter.net/research/pubID.192/pub_detail.asp. Ota identifies three conflict scenarios, including possible Taiwan Strait conflict (which he rates as high intensity, low probability); potential conflict over Senkaku/Diaoyu (middle intensity, middle probability) and Chinese surveillance activity in the Japanese EEZ (low intensity, high probability). *Id.*; Lifeng Jiang, *Some Advice for Japan*, CHINA DAILY, Nov. 4, 2010, http://www.chinadaily.com.cn/opinion/2010-11/04/content_11500095.htm. Admiral Ota suggests better crisis management strategies. Chinese scholar Lifeng Jiang appears to concur in the need for improved Sino-Japanese crisis management strategies. *Id.*

255. *Chinese Nationalists Covet Japan's Okinawa*, S. CHINA MORNING POST, Oct. 14, 2012, http://www.scmp.com/news/china/article/1057756/chinese-nationalists-covet-japans-okinawa. Chinese state-owned media have in fact raised question regarding the legitimacy of Japanese sovereignty over Okinawa. *Id.*

256. UNCLOS, *supra* note 6, art. 7.

257. *Id.* arts. 74, 83.

258. Continental Shelf (Libya v. Malta), 1985 I.C.J. 13 (June 3); VAN DYKE, *supra* note 76, at 59.

259. UNCLOS, *supra* note 6, arts. 74, 76, 83.

260. *See* VAN DYKE, *supra* note 76, at 47-49, 61 (citing a series of cases); AUSTIN, *supra* note 96, at 36-40.

allocation of resource zones around such uninhabitable islands.[261] Given that the past practice of ignoring the island disputes and trying to reach resource agreements has not worked, this article offers a contrarian view that the island disputes may be the proverbial logs jamming up the process and recommends that attention to these issues be prioritized.

Both the island disputes can be taken off the table, either by complete resolution, as seems tenable in the case of Dokdo/Takeshima, or by abandoning resource zone claims, as is clearly called for in respect of Senkaku/Diaoyu. An even better, though unlikely, solution to the latter would be for China to take up Japan's somewhat ambiguous invitation to present the matter to the ICJ. Presumably, none of the parties would want to be seen by their nationals to simply surrender the islands they claim. In the case of Dokdo/Takeshima, the somewhat lesser nationalistic sentiments on this particular claim on the Japanese side has allowed Japan to propose referral to the ICJ. South Korea should take advantage of this opening. The South Korean argument that this is a matter of sovereignty that cannot be submitted to the ICJ is indefensible. The many territorial disputes that make up the bulk of ICJ cases in this area cited herein are all sovereignty disputes. As has been evident in past compromises over fisheries and joint development zones, compromise is something both Japan and South Korea are capable of.

With the Dokdo/Takeshima dispute out of the way and a reasonable willingness to adhere to the UNCLOS requirements to apply established international legal standards towards agreeing on equitable solutions—including baselines and proportional resource allocation—chances are good that all such issues between South Korea and Japan could be solved. It would then be up to the parties, as a matter of prudence, to favor either cooperative arrangements or resource boundary delineation and separate development. It could then be hoped that the approach taken and the standards set may have some effect on the parties' ability to reach compromise with China on other island and resource issues. Cooperative resource development should be about economic development and efficiency and not simply a way of avoiding the equitable solutions specified by UNCLOS. Having needed resources available for commercial harvesting in the region may be more important than who owns the underlying right.

It has to be acknowledged that it may be more difficult to reach final resolution of the Senkaku/Diaoyu sovereignty dispute. It appears civil society on both sides have displayed an enhanced level of nationalism over this issue, making compromise on sovereignty difficult. At the same time, China has long been reluctant to agree to arbitration for matters of this sort. What may be more realistic is to find a way to trim back the resource issues that are implicated. This is the log that can be gently removed from the log-jam if the parties can honestly understand the bargaining chips they have deployed. The most obvious bargain would be Japanese acknowledgment that the islands are entitled under UNCLOS neither to resource zones nor strait baseline inclusion in the Ryukyu Islands. At the same

261. UNCLOS, *supra* note 6, art. 121(3).

time the Chinese side must appreciate that Dongdao Island is likewise not entitled to strait baseline inclusion. Beyond these two cases, there are other baseline issues offering room for equitable tradeoffs. While solving the Senkaku/Diaoyu dispute fully as suggested for Dokdo/Takeshima may be an optimal first choice, trimming back the island dispute to acknowledge resource irrelevance is a good second-best alternative that would be consistent with the parties' international legal obligations. Perhaps then designating the islands a joint special resource conservation zone may diminish the nationalistic sensitivities.[262]

International legal obligations, when it comes to delineating continental shelf rights, likewise clearly require agreement on an equitable solution based on a mix of equidistant lines and proportionality. The relevant baselines from which these principles would be applied have also been made relatively clear by UNCLOS jurisprudence. While both sides would likely have to surrender some of the resources they would hope for, the resolution of these disputes would surely pay great dividends in allowing nearby undersea resources to be commercially developed. The parties would need to decide whether to go the joint development or boundary delineation route. One would hope the recent improved relations between Taiwan and the mainland of China would allow appropriate sharing of whatever benefit was achieved from the Sino-Japanese progress on these sensitive issues. If trimmed back for resource purposes, perhaps the Senkaku/Diaoyu Islands could simply be designated as a joint bird sanctuary with jointly managed fishing rights in conjunction with agreements concerning adjoining areas, as seems appropriate for friendly neighboring countries.

Finally, it should be borne in mind that moving forward in Northeast Asia may provide a more coherent standard for moving forward on the island disputes in the South China Sea. Some leading scholarly opinion favors China on parts of the Paracel Islands and multiple claimants on the Spratlys. If underlying international legal standards are teased out first between South Korea and Japan, and then between China and Japan, such resolution may provide precedent for a more fruitful effort to resolve similar disputes in the South China Sea. Pulling various logs from the log-jam may make further progress in its removal possible. At a minimum, any party that refuses to follow the clearly emerging international legal standards, who clings to excessive bargaining chips, would be exposed and have to bear the diplomatic cost.

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262. Ian Story, *ASEAN and the South China Sea: Movement in Lieu of Progress*, 12 CHINA BRIEF 10, 10 (2012), *available at* http://www.jamestown.org/single/?tx_ttnews[tt_news]=39305#.VGD8_8mRM5c. It is interesting to note that the Philippine government has suggested something similar regarding disputed islands in the South China Sea, or what the Philippines calls the West Philippine Sea, suggesting they be designated a "Zone of Peace, Freedom, Friendship and Cooperation," with accompanying de-militarization and a joint agency to manage seabed resources and fisheries. *Id.*

UNIVERSAL JURISDICTION: CHRONICLE OF A DEATH FORETOLD?

DR. REPHAEL BEN-ARI*

I. INTRODUCTION

At the turn of the century, the doctrine of universal jurisdiction—together with the newly established International Criminal Court ("ICC")—was supposed to have become the bedrock of a multilateral endeavor to create a global system of criminal justice. In the eyes of many, this project was one of the pinnacles of the post-Cold War era, a milestone achievement of modern international law, denoting the Kantian vision of a borderless world unified by neo-liberal ideas of humanism and the rule of law.[1] However, a few commentators were skeptical. These few regarded the possibility of national jurisdictions prosecuting foreign perpetrators for the extraterritorial commission of international crimes to be premature and unrealistic, politically as well as jurisprudentially.[2] Despite the expression of such skepticism being unpopular at the time, it was nevertheless plainly heard by several prominent jurists.

Among these skeptics were then-President of the International Court of Justice ("ICJ") Judge Gilbert Guillaume and Law Lord Nicolas Browne-Wilkinson, who presided over the bench[3] of the House of Lords in the *Pinochet*

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1. *See, e.g.*, ROBERT COOPER, THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE TWENTY-FIRST CENTURY 31 (2003). Cooper regards the ICC as a striking example of the postmodern breakdown of the distinction between domestic and foreign affairs, reflecting the vision of a world that is governed by law rather than by force, in which those who break the law will be treated as criminals. In this postmodern world, *raison d'état* is replaced by a moral consciousness that applies to international relations as well as to domestic affairs. The quest for the establishment of international judicial institutions therefore, although being established by conventional treaties between sovereign states, results in "a growing web of institutions that go beyond the traditional norms of international diplomacy." *See also* Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 Am. J. Int'l L. 1, 3-4 (2011).

2. *See, e.g.*, Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFAIRS, July-Aug. 2001; Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301, 311-12, 356-58, 367-74, 427-28 (2004); Chandra Lekha Sriram, *New Mechanisms, Old Problems? Recent Books on Universal Jurisdictions and Mixed Tribunals*, 80 INT'L AFFAIRS 971, 972, 974-75 (2004).

3. *See* Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415, 428 (2000).

case.[4] The latter was the only scholar not to have joined in the adoption of the 2001 Princeton Principles on Universal Jurisdiction[5]—the most significant academic attempt to date—to propose model principles on universal jurisdiction. Explaining his reasons for dissenting from the project, Lord Browne-Wilkinson stated:

> I am strongly in favor of universal jurisdiction . . . if, by those words, one means the exercise by an international court or by the courts of one state of jurisdiction over the nationals of another state with the prior consent of that latter state. . . . But the Princeton Principles propose that individual national courts should exercise such jurisdiction against nationals of a state which has not agreed to such jurisdiction. Moreover the principles do not recognize any form of sovereign immunity. . . . If the law were to be so established, states antipathetic to Western powers would be likely to seize both active and retired officials and military personnel of such Western powers and stage a show trial for alleged international crimes. Conversely, zealots in Western States might launch prosecutions against, for example, Islamic extremists for their terrorist activities. It is naïve to think that, in such cases, the national state of the accused would stand by and watch the trail proceed: resort to force would be more probable. In any event the fear of such legal actions would inhibit . . . the free interchange of diplomatic personnel.[6]

Judge Guillaume, in his Separate Opinion in the *Arrest Warrant* case,[7] also noted:

> International criminal law has . . . undergone considerable development and constitutes today an impressive legal *corpus*. . . . But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined "international community." Contrary to what is advocated by certain publicists, such a development would present not an advance in the law but a step backward.[8]

These dark prophecies were set aside easily, due to the intellectual atmosphere that ruled at the time. Nevertheless, a decade later, they have essentially foretold the course of developments. Interest groups have consistently manipulated universal jurisdiction, as demonstrated in this paper within the context

4. Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), (1999) 2 W.L.R. 827 (U.K.).

5. PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (Stephen Macedo ed., 2001), *available at* http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

6. *Id.* at 49 n.20.

7. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. Rep. 3, 35 (Feb. 14).

8. *Id.* at 35, ¶ 15 (Separate Opinion of President Guillaume).

of the ongoing Middle-East conflict and the "war on terror."[9] Consequently, leading jurisdictions that had initially adopted ambitious versions of universal jurisdiction-based proceedings were compelled to pass far-reaching modifications to their laws.

This paper traces the way in which the concept of universal jurisdiction has been abused since the late 1990s as part of the so-called "lawfare" against Israel.[10] The following section, Part II, will review briefly the significance of the universal jurisdiction doctrine, and the main complexities involved in its application within the framework of the multilateral endeavor to establish an overall system of international criminal justice. More specifically, Part III will discuss the inherent potential for manipulation and abuse involved in the exercise of universal jurisdiction by national courts. Parts IV-VI will review the various universal jurisdiction-based proceedings initiated against Israeli officials in the legal systems of Belgium, Spain, and the United Kingdom respectively, pointing to the dangers of unrestrained application of the doctrine, as well as the lack of consensus surrounding its implementation. The last part will demonstrate how the intensive manipulation of universal jurisdiction has resulted in a counter-reaction that has, in fact, set back the cause of international global justice, while revealing the risks involved in the application of a largely unsettled legal doctrine. Altogether, this has been a historical milestone that will undoubtedly change the way universal jurisdiction is viewed and dealt with by jurists and politicians alike.

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9. *See also* Luc Reydams, *The Rise and Fall of Universal Jurisdiction* 24-27 (Leuven Ctr. for Global Governance Studies, Working Paper No. 37, 2010), *available at* https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp31-40/wp37.pdf.

10. Originally, "lawfare" was a neutral term, popularized in a 2001 speech at Harvard University by Maj. Gen. Charles Dunlap, who defined it as "a strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective." Today, although some argue that "lawfare" involves the positive use of law and legal institutions to achieve strategic objectives without the use of military force, the more common use of the term in popular discourse has a distinctly negative connotation, suggesting abuse, misuse, and exploitation of the law. Thus, the term is used mostly as a label to criticize those who use international law and legal proceedings against the state, especially in areas related to national security, to achieve strategic military or political ends. In any case, it is acknowledged that "lawfare" is "a powerful term that reflects the importance of law in the conflicts of the twenty-first century," and that the "legitimate application of international law against participants in an armed conflict should not be labeled "lawfare" (although there is no agreement on a definition of "legitimate application"). *See Is Lawfare Worth Defining? Report of the Cleveland Experts Meeting Sept. 11, 2010*, 43 CASE W. RES. J. INT'L L. 11, 12-13, 18, 20-21 (2010). "*The Lawfare Project*"—a New York-based organization devoted to exposing alleged abuses of the international legal system—cites as examples of "lawfare" the case brought to the ICJ on the legality of Israel's security barrier; human rights cases sponsored by pro-Palestinian organizations; and litigation in support of terrorist detainees. *See id.* at 12 n.3. In recent years "lawfare" has been associated with the spread of universal jurisdiction, particularly in the case of Israeli officials. *See* Reydams, *supra* note 9, at 26 n.75.

II. THE COMPLEX VISION OF INTERNATIONAL CRIMINAL JUSTICE

The last two decades witnessed an unprecedented and rapid development in the field of international criminal law.[11] With the end of the stagnancy and pessimism that characterized the Cold War era, the path opened for a new "post-modern" era, underlined by the notions of globalization, de-territorialization, and interconnectedness, as well as the upholding of the human interest, which supposedly supersedes national interests.[12] Against this background, the quest for the establishment of a global system of international justice was enthusiastically heard within the diplomatic, academic, and civil-society circles.[13] This intellectual and political atmosphere facilitated the establishment of several *ad hoc* international criminal tribunals,[14] as well as the adoption of the Rome Statute and the formation of the ICC—a long-awaited major achievement.[15] This atmosphere also encouraged renewed interest in the concept of universal jurisdiction, expected to become a cornerstone of a multilateral endeavor motivated by the vision to create a comprehensive system to ensure that perpetrators of the "most serious crimes of international concern"[16] would not find a safe haven, and to deter potential perpetrators—mostly leaders, high-ranking officials, and commanders—from materializing their atrocious schemes.[17]

Universal jurisdiction is by no means a new concept.[18] Nevertheless, despite recurring attempts by various forums to outline the doctrine,[19] it is still difficult to

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11. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 4 (2d. ed. 2008); MALCOLM N. SHAW, INTERNATIONAL LAW 398, 402-03 (6th ed. 2008).

12. *See, e.g.*, COOPER, *supra* note 1, at 50-51, 76 (explaining that in the so-called postmodern international order, as the state itself becomes less dominating, "state interest becomes less of a determining factor in foreign policy: the media, popular emotion, the interests of particular groups or regions (including transnational groups) all come into play." Consequently, the "postmodern state" values above all the individual, and society as a whole becomes more skeptical of state power, less nationalistic. For the "postmodern state" success therefore supposedly means openness and transnational cooperation.). For further discussion of the notions of globalization and de-territorialization in the context of a postmodern normative discourse, *see* REPHAEL H. BEN-ARI, THE NORMATIVE POSITION OF INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS UNDER INTERNATIONAL LAW—AN ANALYTICAL FRAMEWORK 181-221 (2012).

13. *See, e.g.*, Reydams, *supra* note 9, at 4-6.

14. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY] (establishing the International Criminal Tribunal for the former Yugoslavia); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR] (establishing the International Criminal Tribunal for Rwanda); as well as mixed/hybrid tribunals such as the Special Court for Sierra Leone and the Special Tribunal for Lebanon. *See generally* SHAW, *supra* note 11, at 417-18.

15. Considered by some authors to be the most important institutional innovation since the founding of the United Nations. *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT X (4th Ed. 2011).

16. *See* Rome Statute of the International Criminal Court, Preamble, art. 1, UN Doc. A/CONF.183 (July 17, 1998).

17. For a discussion of the objectives of international criminal law, *see* ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 22-39 (2010).

18. *See* LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 28-42 (2003); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J.

find a broadly accepted definition that describes the legal notion of the principle of universal jurisdiction.[20] Clearly, this is one of the main reasons for the substantial confusion surrounding this usage. The 2009 African Union-European Union ("AU-EU") Joint Expert Report on the Principle of Universal Jurisdiction suggests that:

> [U]niversal criminal jurisdiction is the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state, by nationals of another state, against nationals of another state, where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction.[21]

In other words, universal jurisdiction amounts to an exceptional extraterritorial claim by a state to prosecute crimes in circumstances where none of the traditional criminal jurisdictional links that rely on a territorial or national nexus[22] exists at the time of the commission of the alleged offence.[23] It is the heinousness and gravity of the alleged offence—indeed an *international* crime[24]—that theoretically justifies the assertion of jurisdiction by national judges,

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121, 130 (2007); Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond*, 35 GA. J. INT'L & COMP. L. 495, 499 (2007).

19. *See, e.g.*, Draft Code of Crimes against the Peace and Security of Mankind, Rep. of the Int'l Law Comm'n, 48th Sess., May 6-July 26, 1996, U.N. Doc. A/CN.4/L.522 and Corr.1, at 15-56, *reprinted in* [1996] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1996/Add.1; INT'L LAW ASS'N COMM. ON INT'L HUMAN RIGHTS LAW & PRACTICE, FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENCES, REP. OF THE 69TH CONFERENCE (2000); PRINCETON PROJECT ON UNIVERSAL JURISDICTION, *supra* note 5; *see also* INT'L COUNCIL ON HUMAN RIGHTS POLICY, HARD CASES: BRINGING HUMAN RIGHTS VIOLATIONS TO JUSTICE ABROAD—A GUIDE TO UNIVERSAL JURISDICTION (1999), *available at* http://www.ichrp.org/files/reports/5/201_report_en.pdf.

20. *See* Jouet, *supra* note 18, at 498-99. *See, e.g.*, Press Release, General Assembly, Principle of 'Universal Jurisdiction' Again Divides Assembly's Legal Committee; Further Guidance Sought from International Law Commission, U.N. Press Release, GA/L/3415 (Oct. 12, 2011) (statement of Mr. Vieria, Brazil) (calling to "find an acceptable definition of universal jurisdiction").

21. *See AU-EU Technical Ad hoc Expert Rep. on the Principles of Universal Jurisdiction*, ¶ 8, Council of the Eur. Union 8672/1/09 Rev 1 (Apr. 16 2009), *available at* http://www.africa-eu-partnership.org/pdf/rapport_expert_ua_ue_competence_universelle_en.pdf.

22. That is, the principles of territoriality, nationality, passive personality, or the protective principle, ordinarily necessary under international law in order to assert jurisdiction by national authorities.

23. *See AU-EU Technical Ad hoc Expert Rep.*, *supra* note 21, ¶ 8.

24. The modern category of "*international* crimes," unlike "*transnational* crimes" (such as illicit trafficking in narcotic drugs, unlawful arms trade, money laundering, etc.), includes breaches of *international rules*, intended to protect *values* considered important by the international community and consequently binding all states and individuals. The heinousness and gravity of the crimes—or in the words of the Rome Statute, the recognition that such grave crimes, being "the most serious crimes of concern to the international community as a whole," threaten "the peace, security and well-being of the world"—underline the universal interest in their repression, and entails the personal criminal liability of the perpetrators. See CASSESE, *supra* note 11, at 11-12; SCHABAS, *supra* note 15, at 89-90; NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 3-4, 18-19 (2012); Rome Statute of the International Criminal Court, *supra* note 16, at Preamble & arts. 5-8; Draft Code of Crimes against the Peace and Security of Mankind, *supra* note 19, arts. 1-2, 16-20.

supposedly acting on behalf of the interests of the "international community as a whole."[25]

Universal jurisdiction is not the only international legal doctrine that enables states to assert jurisdiction over foreign nationals with regard to crimes that have not been committed on their soil. Numerous international treaties *oblige* signatory states to exercise their criminal jurisdiction over crimes defined in those treaties[26] or to extradite the alleged offender to states that will prosecute them; this obligation materializes when the suspect is *present* in the territory of the forum state.[27] Unlike this form of *treaty-based* extraterritorial jurisdiction, universal jurisdiction is regulated by *customary* international law. States thus largely accept that customary law *permits*[28] them to exercise their criminal jurisdiction over certain categories of international crimes (such as genocide, crimes against humanity, certain war crimes, piracy, etc.).[29] However, national legislation, jurisprudence, and practice are far from being conclusive regarding the definition of categories of international crimes justifying the assertion of universal jurisdiction.[30] Furthermore, it is unclear whether a state can exercise universal jurisdiction *in absentia*, without the accused being in the custody of the forum state.[31] Another controversial question, which remains open, is the scope of

25. *See* Rome Statute of the International Criminal Court, *supra* note 16, Preamble; *see also* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Preamble, Aug. 8, 1945, U.S.-Fr.-U.K.-U.S.S.R *available at* http://avalon.law.yale.edu/imt/imtchart.asp ("acting in the interests of all the United Nations").

26. Such treaty crimes include grave breaches of the 1949 Geneva Conventions, the crime of torture as defined in the Convention against Torture 1984, the crime of enforced disappearance as defined in the Convention against Enforced Disappearance 2006, as well as certain crimes defined in the so-called set of anti-terrorism conventions.

27. The so-called principle of *Aut Dedere Aut Judicare* ("extradite or sentence"), which is frequently confused with the principle of universal jurisdiction. *See also* Questions Relating to Obligation to Prosecute or Extradite (Bel. v. Sen.), 2012 I.C.J. 422, ¶¶ 68, 89-91, 94-95, 99-100 (July 20, 2012); Zdzislaw Galickki, Special Rapporteur, *Third Report on the Obligation to Extradite or Prosecute (aut Dedere aut Judicare)*, Int'l L. Comm'n, 60th Sess., May 5–June 6, July 7–Aug. 8, 2008, UN Doc. A/CN.4/603, ¶¶ 24-25, 30, 40, 42, 45-48, 83, 87, 98, 101-02, 105-06, 116, 123-25, 127 (June 10, 2008).

28. There is no *duty* under customary international law to prosecute all serious human rights abuses under universal jurisdiction. *See, e.g.*, Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 895 (2003); Colangelo, *supra* note 18, at 130.

29. *See, e.g.*, Colangelo, *supra* note 18, at 130.

30. *See* discussion in Arrest Warrant of 11 April 2000, *supra* note 7, at 36 (Separate Opinion of President Guillaume), 63 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal); *see also* Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 735-60 (2004).

31. An echo to this controversy can be found in the Joint Separate Opinions of Judges Higgins, Kooijmans and Buergenthal, and the Separate Opinion of President Guillaume. Arrest Warrant of 11 April 2000, *supra* note 7, at 35-46, 63-91. *See also* Jouet, *supra* note 18, at 498-99 (distinguishing between countries (such as Austria, France, and Switzerland) that uphold a so-called doctrine of *conditional* universal jurisdiction, that requires custody of the accused in order to initiate proceedings (including investigation), and countries (such as Belgium and Spain, prior to the passage of amendments to their universal jurisdiction laws) that support the *absolute* universal jurisdiction

universal jurisdiction *vis-à-vis* the immunity recognized for certain high-ranking officials under international law.[32]

III. THE INHERENT PORTENTIAL FOR MANIPULATION AND ABUSE

The ICC and *ad hoc* criminal tribunals are international institutions that act on the basis of broad consensus reflected in constituent international treaties and binding resolutions of the U.N. Security Council.[33] These documents outline a rather comprehensive scheme of jurisdictional checks and balances. Universal jurisdiction, on the other hand, is implemented by *national* authorities. Its application and interpretation is therefore subjected to the discretion of national prosecution and judicial authorities as well as the conceptions of politicians regarding the interests of the international community.[34]

In view of the above, although the modern idea of universal jurisdiction was often discussed after the Nuremberg and Tokyo trials[35] and the judgment of the Israel Supreme Court in the *Eichmann* case,[36] until two decades ago states were

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doctrine, allowing to prosecute a defendant regardless of whether he or she is in custody); *see also* O'Keefe, *supra* note 30, at 747.

32. The ICJ determined, under customary international law, certain holders of high-ranking office in a state, such as the Head-of-State, Head-of-Government, and Minister of Foreign Affairs (as well as diplomatic and consular agents) are entitled, while in office, to an absolute (procedural) personal state immunity from jurisdiction in other states. The Arrest Warrant of 11 April 2000, *supra* note 7, ¶ 51. The list of high-ranking government officials entitled to such immunity is not exclusive, and depends on the function of the state official concerned. *See also Application for Arrest Warrant against General Shaul Mofaz*, Bow St. Mag. Ct. (unreported), ¶¶ 10-15 (Feb. 12, 2004), http://www.geneva-academy.ch/RULAC/pdf_state/Application-for-Arrest-Warrant-Against-General-Shaul-Mofaz.pdf; Anatolevich Kolodkin, Special Rapporteur, *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, Int'l L. Comm'n., 60th Sess., May 5-June 6, July 7-Aug. 8, 2008, UN Doc. A/CN.4/601, ¶¶ 30-34, 39, 41, 61-63, 66-67, 109, 117-121 (May 29, 2008).

33. *See also* Sriram, *supra* note 2, at 311-312. *See* Rome Statute of the International Criminal Court, *supra* note 16; ICTY, *supra* note 14; ICTR, *supra* note 14.

34. Kontorovich notes that while all nations are in effect joint owners of a right to prosecute under universal jurisdiction, and may share a common interest in universal jurisdiction offences, they manifestly differ in the valuations they assign to this interest. Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, 2008 U. ILL. L. REV. 389, 405 (2008). *See also* Sriram, *supra* note 2, at 309 (noting that national judges have taken radically different approaches to the exercise of universal jurisdiction).

35. *See* Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, T.S. No. 27 (Sept. 30 - Oct. 1, 1946); Judgment of the International Military Tribunal for the Far East, (U.S. v. Araki), (12 Nov. 1948).

36. Israel was one of the first states to enact legislation based on the doctrine of universal jurisdiction for war crimes, crimes against the Jewish people and crimes against humanity. Nazis and Nazi Collaborators Punishment Law, 5710-1950, SH No. 57. The law was the legal basis for the *Eichmann* case, decided by the District Court of Jerusalem and the Supreme Court of Israel in 1961/2. CrimC (Jer.) 40/61 Attorney General v. Eichmann, (1961); CA 336/61 Eichmann v. Attorney General [1962]. As such, the case is considered the starting point in so far as universal jurisdiction as manifested in domestic courts is concerned. *See* SHAW, *supra* note 11, at 671. Although, as the judges in the *Eichmann* case made clear, due to the unique circumstances, the jurisdiction of Israel was also based on the principle of passive personality, due to the fact that the victims were Jewish and were therefore represented by the State of Israel, which was the Jewish state. CA 336/61 Eichmann v.

reluctant to implement it. The high political costs and the risks of infringing upon the sovereignty of other states deterred national authorities from legislating and applying this vague customary doctrine.[37] Nevertheless, in the late 1990s, several countries—mostly Western-European, led by Belgium and Spain, which were probably motivated by the adoption of the Rome Statute and heated discussions about the future of the international rule of law in view of dreadful events such as in Kosovo, Rwanda, and Congo—began to adopt laws enabling their courts to hear claims based on the principle of universal jurisdiction.[38] Such claims, submitted by foreign individuals, mostly victims of atrocities, and various international non-governmental organizations ("INGOs"), on the basis of national legislation that broadly interpreted the principle of universal jurisdiction, brought about a massive number of claims that practically turned certain European capitals into self-appointed international criminal courts.[39] Eventually, only very few of these claims matured into convictions.[40] However, this has not prevented numerous claimants and interested parties to issue complaints against top foreign officials and political leaders, having discovered the possibility of abusing universal jurisdiction-based proceedings as a powerful tool for the promotion of political agendas.

The record of pro-Palestinian groups in this regard has been highly significant. The intensive manipulation of universal jurisdiction in the past few years, within the framework of their so-called "lawfare" campaign against Israel,[41] takes much credit for the fact that within less than a decade, most of the leading countries that recognized an unqualified national version of universal criminal jurisdiction had to modify their legislation to limit the ability of foreign interest groups and individuals to initiate proceedings that abused their courts.[42]

The potential for abuse and politicization of the universality principle is signifiant. It was mainly for this reason that universal jurisdiction was sharply described by one commentator as a "waking giant" that might brutally threaten to smash the already fragile web of interstate relations.[43] As interest groups soon discovered, the costs of initiating a claim were relatively low, while the potential

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Attorney General [1962], ¶¶ 6, 9-12. *See also* Arrest Warrant of 11 April 2000, *supra* note 7, at 40-43 ¶ 12 (considering Israel's legislation and jurisprudence to constitute "a very special case").

37. *See* Byers, *supra* note 3, at 420-21.

38. *See* Jouet, *supra* note 18, at 501; Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO L.J. 1057, 1059-60 (2004).

39. In fact, the jurisdiction of the ICC is considerably narrower than that which was claimed by some states under the doctrine of universal jurisdiction. See SCHABAS, *supra* note 15, at xi-xii, 63-67; Rome Statute of the International Criminal Court, *supra* note 16, art. 12.

40. *See* Reydams, *supra* note 9, at 22; Michele Hirsch & Natalie Kumps, *The Belgian Law of Universal Jurisdiction Put to the Test*, 35 JUSTICE 21 (2003).

41. *See, e.g.*, Edwin Bennatan, *The Use and Abuse of Universal Jurisdiction*, Point/Counterpoint blog, JERUSALEM POST (Nov. 28, 2010 5:53 PM), http://www.jpost.com/Blogs/Point-Counterpoint/The-use-and-abuse-of-Universal-Jurisdiction-368079.

42. *See infra* Parts IV-VI.

43. *See* Yaffa Zilbershats, *Universal Jurisdiction: The Waking Giant*, 35 JUSTICE 15 (2003).

for political and media gains were enormous.[44] Since universal jurisdiction-based proceedings were the exclusive domain of national, rather than international, judicial authorities, in most cases it was sufficient for interest groups or individuals to find a low-level, like-minded judge who was willing to begin an investigation into a case, or worse, to issue an arrest warrant against some senior foreign official.[45] Regardless of the fact that in most cases such a warrant was revoked and the complaint was withdrawn,[46] the harassment caused to the official, the headlines that such an investigation produced, and the political embarrassment that followed had an immediate impact on international public opinion. It also impacted the bilateral relations between the forum state and that of the suspected official. If the latter retaliated, the two governments could very soon find themselves in the eye of an international political storm that could easily get out of hand. For these reasons, bringing suspected perpetrators of international crimes to justice has turned, at best, into a secondary goal; the golden opportunity to interfere in the normal course of interstate relations has become a prominent incentive to filing complaints against foreign officials in third states.

In the following sections, I will review the proceedings initiated against Israeli officials in Belgium, Spain, and the United Kingdom from 2001 to 2010. Lawsuits against Israeli officials were also initiated in other countries.[47] However,

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44. *See, e.g.*, Chibli Mallat, *Special Dossier on the "Sabra and Shatila" Case in Belgium: Introduction: New Lights on the Sharon Case*, in THE PALESTINE YEARBOOK OF INTERNATIONAL LAW VOL. XII (2002-2003) 183, 183 (Camille Mansour, ed., 2004) (admitting that he, as the counsel for the Sabra and Shatila victims in the Sharon and Yaron case in Belgium, could not imagine that the case "would develop into the most serious crisis between Tel-Aviv and a European capital since the establishment of the State of Israel; and that both the U.S. Secretary of State and his defense counterpart would weigh in personality against the law on which the case was based.").

45. *See, e.g.*, Bennatan, *supra* note 41.

46. *See, e.g.*, *Recent Legislation: International Law – Universal Jurisdiction – United Kingdom Adds Barrier to Private Prosecution of Universal Jurisdiction Crimes—Police Reform and Social Responsibility Act, 2011, c. 13 (U.K.)*, 125 HARV. L. REV. 1554 (regarding the arrest warrants issued in the cases of Maj. Gen. Doron Almog (Sep. 2005), and former Foreign Affairs Minister Tzipi Livni (Dec. 2009) in the U.K.). *See also* Reydams, *supra* note 9, at 22 (distinguishing the features of the few so-called universal jurisdiction "hard cases" that did result in trial and conviction). Nicolaou-Garcia also acknowledges that since politics plays a pivotal role in high-profile universal jurisdiction cases, judicial investigations are normally halted and parliaments change their universal jurisdiction law. *See* SILVIA NICOLAOU GARCIA, MIDDLE EAST MONITOR (MEMO, LONDON), EUROPEAN EFFORTS TO APPLY THE PRINCIPLE OF UNIVERSAL JURISDICTION AGAINST ISRAELI OFFICIALS, (2009), *available at* http://www.middleeastmonitor.com/reports/by-silvia-nicolaou-garcia/. Prosor notes that "campaigners targeting Israeli officials know they have no chance of getting a prosecution, let alone a conviction. Instead they are seeking a media circus and PR victory." Ron Prosor, *A Loophole that Must Be Repaired*, JUSTICE, Winter 2011, at 36.

47. In Switzerland (against Binyamin Ben-Eliezer, former Minister of Defense, and others); in New Zealand, 2005 (against Moshe Ya'alon, former Chief-of-Staff of the IDF); in the United States, 2005 (against Moshe Ya'alon); in the United States, 2005 (against Avi Dichter, former Director of the General Security Service); in Holland, 2008 (against Ami Ayalon, former Director of the General Security Service); in Norway, 2009 (against Ehud Olmert, former Prime Minister, Ehud Barak, former Minister of Defense, Tzipi Livni, former Minister of Foreign Affairs, and others); in Turkey, 2009 (against Shimon Peres, former Prime Minister and Minister of Defense, Ehud Olmert, Tzipi Livni, Ehud Barak, and Gabi Ashkenazi, former Chief-of-Staff). The list is not conclusive. JERUSALEM CENTER

abuse of universal jurisdiction proceedings in these particular states was the most far-reaching and thus exemplify the high costs involved in "universal jurisdiction campaigns."

IV. THE PROCEEDINGS IN BELGIUM

The pilot case brought by pro-Palestinian plaintiffs under national universal jurisdiction legislation was the *Sharon Case*.[48] Although this case did not result in a conviction, the public, political, and legal turmoil it caused, which lasted for several years, motivated pro-Palestinian groups to initiate many additional proceedings in various countries in Europe.[49]

In June 2001, twenty-four individuals of Palestinian or Lebanese origin filed a complaint in Belgium against the then Prime Minister of Israel, Ariel Sharon, and the Director-General of the Ministry of Defense, Amos Yaron, for genocide, crimes against humanity and war crimes.[50] The two top government officials were accused of being responsible for the Sabra and Shatila massacres in 1982.[51]

FOR PUBLIC AFFAIRS, PALESTINIAN MANIPULATION OF THE INTERNATIONAL COMMUNITY 40 n.30 (Alan Baker ed., 2014), *available at* http://jcpa.org/wp-content/uploads/2014/04/Palestinian_Manipulation.pdf. *See also* Overview of Lawfare Cases Involving Israel, NGO MONITOR (last visited Aug. 30, 2013), *available at* http://www.ngo-monitor.org/article/ngo_lawfare.

48. H.S.A et al. v. S.A. et al., Cour de Cassation [Cass.] [Court of Cassation], Feb. 12, 2003, No. P.02.1139. F/1 (Belg.), 42 I.L.M. 596 (2003).

49. *See* Mallat, *supra* note 44, at 183. The unique and complex set of circumstances in the Sharon and Yaron affair—the fact that Sharon was an acting Prime Minister entailed to procedural immunity under international law; that Sharon and Yaron were not present in Belgium; that the Sabra and Shatila massacres were already investigated in Israel by a special investigation commission (the Kahan Commission) that was authorized to recommend disciplinary or criminal proceedings; and that the Lebanese authorities had granted a general amnesty to the perpetrators of the massacres—probably made potential claimants believe that under a different, less complicated and contentious set of circumstances, an action against Israeli officials could be successful. *See, e.g.*, Arwa Arburawa, WAR CRIMES IN GAZA 9, 49-51 (Rajnaara Akhtar, ed., Sept., 2009), *available at* http://issuu.com/friendsofalaqsa/docs/gaza_report_web?viewMode=magazine.

50. The complaint was the initiative of Chibli Mallat, Professor in European Law in St. Joseph's University in Beirut, together with two Belgian lawyers, Michaël Verhaeghe and Luc Walleyn. It was the outcome of months of intensive research in the Palestinian refugee camps in Lebanon aimed at identifying the immediate relatives of victims of the massacres, held by Sana Hussein and Dr. Rosemary Sayegh, "friend of the Palestinian cause," dealing with Palestinians in Lebanon. *See* Mallat, *supra* note 44, at 183, 185. The criminal procedure under the Belgian law was based on the system of *constitution de partie civile* ("plaintiff-prosecutors" system), by which the victims initiate cases before an investigating judge. *See* Ratner, *supra* note 28, at 890.

51. The massacres of 700-800 Palestinians occurred in the Sabra and Shatila refugee camps between 16-18 Sep. 1982, during the Lebanon War, by Christian Phalanges in revenge for previous massacres and the assassination of their leader Bashir Jumayil. Following the massacres, the Israeli government appointed an inquiry commission chaired by Justice Kahan to investigate the events and Israel's role in them. The commission did not find any of the relevant Israeli office holders directly responsible, although it criticized several of them for not being sufficiently aware of the possible implications of the Phalanges' advance into the camps; Sharon was required to resign from his post. For a historical account of the events in Lebanon, *see* Yoav Gelber, *The Lawsuit Submitted against*

Clearly, the claimants were encouraged by the November 1998 and March 1999 landmark rulings of the House of Lords in *ex parte Pinochet*[52] that allowed, for the first time, the extradition of a former head of state, the Chilean dictator Augusto Pinochet, from Britain to Spain, following a request made by a Spanish investigating judge on the basis of the Spanish universal jurisdiction law.[53] The very supportive public and academic atmosphere that surrounded the Pinochet proceedings gave the impression that legal history was being made and that victims would finally find redress under the doctrine of universal jurisdiction.[54] It gave the claimants reason to believe that similar proceedings in other countries against acting top officials could be highly successful and attract extensive public attention. Belgium was a strong possibility as a venue for such claims: it was one of the countries which, in addition to Spain, had an arrest warrant outstanding against Pinochet, and it was the only government that joined human rights organizations in challenging the decision by the U.K. Home Secretary not to release the report that led to Pinochet's eventual release on medical grounds.[55]

A. Malicious Forum Shopping

The claimants chose the Belgian forum after careful examination of the various options within a number of western systems.[56] The 1993 Belgian law (as amended in 1999) established the universal jurisdiction of the Belgian courts, which related to the prosecution of gross violations of international humanitarian law, genocide, and crimes against humanity.[57] The law had already been applied once, which in June 2001—just a few days before the complaint against Sharon and Yaron was filed[58]—led to the conviction of four Rwandan defendants who resided in Belgium and were found guilty of participating in the 1994 Rwandan

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Ariel Sharon in Belgium: Historical Background, 35 JUSTICE 25-28 (2003), *available at* http://www.intjewishlawyers.org/main/files/Justice%20No.35%20Spring%202003.pdf . Sharon was the Israeli Defense Minister in 1982, and Yaron was the general in charge of the Beirut sector. For a detailed chronology of the proceedings in Belgium, *see* Hirsch & Kumps, *supra* note 40, at 20-24. *See also* Ratner, *supra* note 28 at 889-92.

52. Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 1), (1999) 2 W.L.R. 827 (U.K.); Regina v. Bow St. Metro. (No. 3), at 147. Eventually, despite an executive decision (October 1999) to allow the extradition of Pinochet to Spain, he was found unfit medically to stand trial. The extradition was called off and Pinochet was released and sent back to Chile. *See* Byers, *supra* note 3, at 437-38.

53. *See* Mallat, *supra* note 44, at 183.

54. *See* Jouet, *supra* note 18, at 502; *id.* at 187, 189; *see generally* Byers, *supra* note 3, at 418-22.

55. *See* Byers, *supra* note 3, at 438; Hirsch & Kumps, *supra* note 40, at 21. Belgium's challenge was successful and the medical report was released.

56. *See* Mallat, *supra* note 44, at 186. Recall that although the majority in *Pinochet III* upheld the decision in *Pinochet I* to deny former Head-of-State immunity, the ruling was not based on customary international law, but relied primarily on the Torture Convention and the Criminal Justice Act 1988, thus limiting the denial of immunity to those instances where universal jurisdiction had specifically been accepted by way of treaty and statute. *See* Byers, *supra* note 3, at 434. Therefore, despite the Pinochet precedent in the United Kingdom, it was preferable to go to Belgium.

57. *See* Hirsch & Kumps, *supra* note 40, at 20. *See generally* Langer, *supra* note 1, at 26-32.

58. The filing of the complaint on behalf of the Sabra and Shatila victims immediately after the conviction in the "Rwandan trial" was carefully calculated. *See* Mallat, *supra* note 44, at 184.

genocide.[59] The "Rwandan trial" led to a stream of complaints filed in Belgium[60] against high-ranking foreign government officials.[61] Some of these complaints, however, did not have any link whatsoever to Belgium.[62] Eventually, this led some Belgian politicians and jurists to call for amendments to the law that would limit its unqualified application.[63] The Palestinian complaint filed in the midst of this domestic debate regarding the Belgian law politicized the dispute by provoking NGOs and politicians—who were lobbied intensively—to take a harsher public stance in favor of an extension of Belgian jurisdiction.[64]

The political nature of the complaint in the Sharon case was obvious: none of the complainants resided in Belgium.[65] More significantly, the complaint failed to mention any of the Lebanese citizens who were directly responsible for the massacres.[66] The complaint highlighted the crime of genocide,[67] giving the impression that the defendants were involved in a comprehensive genocidal scheme and bearing the potential for further allegations against other officials involved in the Lebanon War. The claimants strategically timed the filing of the complaint, tailoring it to fit the delicate political circumstances: it was three months after Prime Minister Sharon was elected (March 2001) and right before Belgium was to assume the Presidency of the European Union (July-December 2001).

B. A Universal Jurisdiction Campaign

The filing of the complaint was accompanied by a well-orchestrated press campaign. On the eve of filing the complaint, BBC aired its Panorama program *The Accused*, investigating the role of Sharon in the Sabra and Shatila massacres, of which counsels for the victims had been informed two weeks in advance

59. On the significance of the "Rwandan trial" and its possible consequences as a leading universal jurisdiction precedent *see* Ratner, *supra* note 28, at 892; Jouet, *supra* note 18, at 528-29.

60. Which turned Belgium into the uncrowned "world capital of universal jurisdiction." *See* Jouet, *supra* note 18, 501 (quoting Orentlicher, *supra* note 38).

61. *See* Hirsch & Kumps, *supra* note 40, at 21; Langer, *supra* note 1, at 30.

62. In the beginning, either the suspect or the victims were living in Belgium. In a later stage, complaints did not even possess such links. *See* Hirsch & Kumps, *supra* note 40, at 21.

63. Although Belgium's law was not the world's first domestic statute on universal jurisdiction, it was certainly the broadest in terms of the crimes it covered and the lack of any required link to Belgium. *See* Ratner, *supra* note 28, at 889. Evidently, the original law was passed without taking into account the various serious issues entailed by the enactment of such law and its application. *See* Hirsch, *supra* note 40, at 21. *See generally* Adrien Masset, *The Supreme Court of Belgium Puts an End to the Prosecution of Sharon*, 35 JUSTICE 29-30 (2003), *available at* http://www.intjewishlawyers.org/main/files/Justice%20No.35%20Spring%202003.pdf.

64. *See* Hirsch & Kumps, *supra* note 40, at 21, 23. A group of six NGOs was established to participate in the drafting process, in an effort to ensure the adoption of an interpretative legislation that extended the scope of the universal jurisdiction law.

65. *Id.* at 21.

66. *Id.*

67. *Id.*

through an Amnesty International friend.[68] Counsel for the claimants distributed the lengthy text of the complaint at a press conference held immediately after it had been formally filed; the text was later posted on the Internet and translated into six languages.[69] A special website dedicated exclusively to the case launched the "International Campaign for the Victims of Sabra and Shatila,"[70] while supportive "Sabra and Shatila committees" sprang up across the world.[71] All of this attracted massive media attention as well as the active involvement of academics and human-rights activists.[72] Massive financial support and the backing of leading INGOs, including Amnesty International, Human Rights Watch, and *Avocats Sans Frontières*, were assured in advance,[73] coloring the proceedings as a battle, pitting Israel against universal jurisdiction and the global "fight against impunity."[74]

Belgian politicians were also motivated to get involved in the proceedings. A group of Belgian senators intervened several times before the Prosecution Chamber.[75] A delegation of senators, headed by J. Dubié, Head of the Justice Commission at the Belgian Senate, along with leading journalists, even flew to Lebanon to meet with Elias Hobeika, the leader of the Phalangist forces who had been accused of directing the massacre in the camps.[76] A meeting with victims of the massacres, who were flown to Belgium, was organized at the Belgian Senate following a hearing before the Prosecution Chamber.[77] During the hearing, invitations to journalists to attend a press conference at the Senate were distributed.[78]

C. Legal Turmoil and Political Embarrassment

From the moment that the Belgian prosecution invited the investigating magistrate to begin the examining procedure and the State of Israel got involved in the proceedings, challenging the legality of the unqualified Belgian law under

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68. Mallat, *supra* note 44, at 185-86. *See also The Accused* (BBC Television broadcast Jun. 17, 2001), *available at* http://news.bbc.co.uk/2/hi/programmes/panorama/1381328.stm.

69. *See* Mallat, *supra* note 44, at 185.

70. The International Campaign was coordinated by the leading pro-Palestinian activist, Dr. Laurie King-Irani, who later co-founded the '*Electronic Intifada*.' *See Laurie King-Irani*, UNIV. COLLEGE CORK PALESTINE SOLIDARITY CAMPAIGN, http://cosmos.ucc.ie/cs1064/jabowen/IPSC/php/authors.php?auid=842 (last visited Nov. 25, 2014); *see also* Mallat, *supra* note 44, at 184.

71. Mallat, *supra* note 44, at 184.

72. Mallat acknowledges in particular the active support of Yale Law School Human Rights Clinic, under the direction of Deena Hurwitz and Jim Silk, as well as of Leah Tsemel and Raef Verstraeten. *Id.*

73. *See id.*; *see also* Hirsch & Kumps, *supra* note 40, at 22.

74. Mallat, *supra* note 44, at 186.

75. Hirsch & Kumps, *supra* note 40, at 23.

76. *See id.*; *see also* Mallat, *supra* note 44, at 186-88. Hobeika, former Lebanese MP, was assassinated the morning after his meeting with the Belgian delegation, near his home in a Beirut suburb. Clearly, Hobeika, who was encouraged by the counsels for the victims to take part in the proceedings, saw a golden opportunity to clear his name as the perpetrator of the massacres. *Id.* at 186.

77. *See* Hirsch & Kumps, *supra* note 40, at 23.

78. *Id.*

international law,[79] the "Sharon affair" evolved rapidly, encompassing many twists and turns. The critical issues about whether the presence of the accused was a precondition for the application of universal jurisdiction by national judges—and whether an incumbent Prime Minister was entitled to procedural immunity under international law[80]—were reviewed by the full chain of Belgian courts as well as the most senior prosecution officials, reaching the Supreme Court in 2003 following an appeal by the plaintiffs.[81] Much of the sting of the case was removed once the ICJ ruled in the *Arrest Warrant* case[82] in 2002 that a Prime Minister, while in office, was entitled to procedural-personal (*ratione personae*) immunity from any criminal proceedings under customary international law.[83] Later, although the Appeals Court ruled that the presence of the accused in Belgium was required in order to allow the proceedings, the *Cour de Cassation* overruled the decision, allowing the proceedings against Amos Yaron to proceed, rejecting the position of Israel, and upholding the position that the application of the Belgian universal jurisdiction law was indeed unlimited.[84] In light of this development, and after intensive legal and diplomatic efforts, Israel recalled its ambassador from Brussels.[85]

It was not until a complaint was filed against former President of the United States George H.W. Bush and other high-ranking American officials by several Iraqi families preceding the second war against Iraq,[86] and the American administration threatened to take far-reaching political steps in response—including the closure of the NATO headquarters in Brussels—that the Belgian authorities were finally "convinced" to introduce significant amendments to their law on universal jurisdiction, limiting its scope and proceedings.[87] The amended

79. *See id.* at 22; *see also* Masset, *supra* note 63, at 29-30.

80. Another question was the application of the *non bis in idem* principle, regarding the absence of criminal proceedings in Israel following the publication of the Kahan Commission report and the amnesty granted by the Lebanese authorities to the perpetrators of the massacres in Sabra and Shatila. Masset, *supra* note 63, at 35.

81. A full review of the legal proceedings in Belgium, and the arguments of the State of Israel, is beyond the scope of this paper. *See generally* Hirsch & Kumps, *supra* note 40, at 22-24; *see also* Masset, *supra* note 63, at 29-30.

82. In 2000, the Democratic Republic of Congo contested before the ICJ the legality of an arrest warrant issued by a Belgian judge against Yerodia Ndombasi, the Foreign Minister at the time of the warrant. In 2002 the ICJ found the warrant to be inconsistent with the procedural immunity to which an acting minister of foreign affairs is entitled under customary international law. Case Concerning the Arrest Warrant, *supra* note 7.

83. *See supra* note 32.

84. Ratner, *supra* note 28, at 890.

85. The culmination of what was described by the counsel for the Sabra and Shatila victims as "the most serious crisis between Tel-Aviv and a European capital since the establishment of the state of Israel." Mallat, *supra* note 44, at 183; *see also* Ratner, *supra* note 28, at 890.

86. Vice President D. Cheney, Secretary of State C. Powell, and former general N. Schwartzkopf.

87. Orentlicher, *supra* note 38, at 1062. In view of the American warnings that Belgium was risking its status as a diplomatic capital, G. Verhofstadt—the Belgian Prime Minister leading a pro-human-rights coalition of Liberals, Socialists, and Greens—who during the Sharon trial expressed support for the unqualified application of the law, immediately proposed the amendments to limit its

law essentially required a link between the victim or the accused to Belgium and invested the Federal Prosecutor with wide authority to oversee the proceedings, thus effectively barring foreign individuals and interest groups from filing abusive complaints.[88] Israel's main argument before the Belgian courts—that the initial unqualified version of the law was designed to grant Belgium "virtual and surrealistic jurisdiction over all offences against international humanitarian law in the world,"[89] thus diverting from the scope of universal jurisdiction under customary law and allowing manifestly political claims to proceed—was finally resolved.

Thus, the "Sharon saga" showed the international community that:

> Universal jurisdiction does not operate in a vacuum. The process. . . raises interstate tensions in ways that even the most vociferous criticism by one state of another's human rights practices does not. . . [W]hen justice becomes personal, so does foreign policy. And when private prosecutors are part of the mix, the match can get very ugly.[90]

Unfortunately, although the Sharon case could serve as a laboratory for the future of universal jurisdiction by highlighting the myriad of international actors who had a direct interest in these laws and the steps they would take to advance their claims,[91] some states had yet to learn the lesson.

V. THE PROCEEDINGS IN SPAIN

The Belgian experience, while failing to reach the stage of a court trial, proved to be very fruitful in terms of its political and propaganda impact. Once the Belgian door closed, it was, therefore, a matter of time before more plaintiffs initiated proceedings in countries that still allowed their legislation to be manipulated by foreign complainants. Indeed, as a report issued by the U.K.-based *Friends of Al-Aqsa* revealed, filing lawsuits against Israeli officials was a very high priority for Palestinian activists:

> The momentum is growing and resistance is mounting. Each of us who participates in the Palestinian cause is part of that resistance. Thus far, thousands of us have risen up and taken action. We are working to file arrest warrants for war crimes and crimes against humanity against Israeli military personnel in every jurisdiction around the world that allows it.[92]

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application in order to prevent "manifestly abusive political use of this law." Ratner, *supra* note 28, at 890-91; Langer, *supra* note 1, at 26.

88. The law also acknowledged the immunities of senior officials recognized under customary law; for a review and analysis of the amendments to the Belgian law, *see* Ratner, *supra* note 28, at 890-92. *See also* Hirsch & Kumps, *supra* note 40, at 24.

89. Hirsch & Kumps, *supra* note 40, at 24.

90. Ratner, *supra* note 28, at 893-94.

91. *Id.* at 889. *See also* Jouet, *supra* note 18, at 528.

92. Ismail Patel, *Forward*, in WAR CRIMES IN GAZA, *supra* note 49, at 9.

Spain, the leading country at the time in terms of promoting the notion of an unlimited universal jurisdiction,[93] was an obvious option.[94]

A. The Tyranny of Interested Judges and Activists' Groups

Although the Spanish law on universal jurisdiction, first enacted in 1985, was not as broad as the initial Belgian law,[95] courts still interpreted it as allowing investigations against foreign defendants to be held *in absentia*[96] without any link to Spain.[97] This gave the investigating judges of the *Audiencia Nacional* ("National Audience")[98] expansive jurisdictional power to hear complaints brought by various human rights organizations and private litigants against foreign officials and to open criminal investigations accordingly. Such was the case with the *Pinochet* affair, which brought world fame to the Spanish investigating judge. Baltasar Garzón, who in 1998 demanded the extradition from Britain of the former dictator, within his investigations into the mass atrocities that took place in Chile.[99] Clearly, Garzón set an example for other judges of the *Audiencia*, who were encouraged by various INGOs and human rights purists to continue their "crusade to vindicate gross human rights violations" in Spanish courts.[100] Nevertheless, much like the case in Belgium, and despite the success of the *Pinochet* case, the zealous atmosphere and the fact that several states whose citizens were being prosecuted protested vehemently against the violation of their sovereignty,[101] provoked a public debate in Spain. Pragmatists warned against the adoption of a "radical form of universal jurisdiction devoid of strong procedural footing that could violate international customary law and harm diplomatic relations."[102] This debate was followed by a clash between Spain's two high courts—the Supreme Court and the Constitutional Tribunal—over the correct interpretation of the Spanish law regarding universal jurisdiction.[103] In 2005, the Constitutional Court

93. Jouet, *supra* note 18, at 501.

94. As was predicted by some commentators. *See id.* at 531.

95. *See id.* at 499, 512, 522. *See generally* Langer, *supra* note 1, at 32-41.

96. Jouet, *supra* note 18, at 512 (The Belgian law originally allowed trials *in absentia*, not only investigations).

97. *Id.* at 497, 510.

98. *Id.* at 504 (This is the Spanish trial court responsible for matters of international and national interest, including international crimes and terrorism).

99. The same set of investigations, dealing with the junta reign in Argentina, led in 2004 to the arrest in Spain of Adolfo Schilingo, an Argentine navy officer charged with mass-murdering during Argentina's Dirty War. This was one of the very few and probably the most famous case brought under a universal jurisdiction law that ended in a conviction after passing a complete series of appeals. *See generally id.* at 502, 505

100. *Id.* at 501; Soeren Kern, *Spain, Israel and War Crimes*, GATESTONE INSTITUTE (Apr. 8, 2009, 6:30 AM), http://www.gatestoneinstitute.org/455/spain-isreal-and-war-crimes.

101. Jouet, *supra* note 18, at 502-03.

102. *Id.* at 503.

103. *See id.* at 505-07 (The Supreme Court in 2004 interpreted the law as requiring a link to national interests, clarifying that the Spanish courts could only exert a narrow form of universal jurisdiction. The court explained that a broader form of universal jurisdiction would be unreasonable

eventually overruled the decision of the Supreme Court, thus upholding the unqualified version of the Spanish law.[104] This effectively provided the judges of the *Audiencia* a carte blanche to initiate unrestrained investigations *in absentia*, without having to wait for an alleged culprit to enter Spain's territory.[105]

As in Belgium, the pro-Palestinian lawyers took advantage of the loud, ongoing public debate over the scope of universal jurisdiction in Spain to bring in a controversial complaint against former Israeli officials. In June 2008, the Palestinian Center for Human Rights ("PCHR")[106] filed a complaint before *Audiencia* Judge Fernando Andreu Merelles against seven high-ranking officials for suspected "crimes against humanity" for their involvement in the July 2002 targeted killing of Salah Shehadeh, the commander of the military wing of Hamas in Gaza.[107] The PCHR, acting on behalf of some of the families of civilian casualties, hoped that "universal jurisdiction would become a real avenue for Palestinians to seek redress for Israeli crimes" following this case.[108] To this end, the PCHR hired the services of the Spanish lawyer Gonzalo Boyé—a Marxist

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and would violate the principle of non-intervention in another state's affairs as enshrined in Art. 2(7) of the U.N. Charter).

104. *Id.* at 508.

105. The Constitutional Tribunal essentially held that a procedural link to national interests was not required since universal jurisdiction was exclusively based on the substantive nature of grave crimes affecting the entire international community. *See id.* at 508-10, 512.

106. The PCHR was founded in 1995 by a group of Palestinian human rights lawyers. It mainly operates from Gaza. According to the center's definition, its work includes the documentation and investigation of human rights violations. The center was behind most of the lawsuits against senior Israeli officials abroad: Shaul Mofaz (U.K., 2002); Doron Almog (U.K., 2005); Avi Dichter (U.S., 2005); Moshe Ya'alon (New Zealand, 2006); Binyamin Ben-Eliezer and others (Spain, 2008); Ami Ayalon (Holland, 2008). According to the center's 2008 report, and the reports of the organizations that support it, the main donors to the PCHR are: the *Welfare Association* (financed by the World Bank, among others); the *NGO Development Center* (financed by the World Bank, among others); the *Open Society Institute* (U.S.); *Grassroots International* (U.S.); the *Ford Foundation* (U.S.); as well as the E.U. and several European governments. *See* KELA RESEARCH & STRATEGY, THE FINANCING OF WELFARE ASSOCIATION (WA) AND NGO DEVELOPMENT CENTER (NDC) BY THE US GOVERNMENT VIA THE WORLD BANK 18-19 (on file with the author); *see also* THE MEIR AMIT INTELLIGENCE AND TERRORISM INFORMATION CENTER, THE PALESTINIAN CENTER FOR HUMAN RIGHTS PLAYS A LEADING ROLE IN ANTI-ISRAELI WARFARE AND IS PLANNING TO EXPLOIT OPERATION PILLAR OF DEFENSE TO SUE SENIOR ISRAELI FIGURES 6-8 (2013); *Palestinian Center for Human Rights (PCHR)*, NGO MONITOR, http://www.ngo-monitor.org/article/palestinian_center_for_human_rights_pchr_ (last visited July 2, 2012).

107. *See* WAR CRIMES IN GAZA, *supra* note 49 at 50. For a brief history of the proceedings in Israel, *see* Ido Rosenzweig & Yuval Shany, *Universal Jurisdiction: Spanish Court Initiates an Inquiry of the Targeted Killing of Salah Shehadeh in Gaza*, TERRORISM AND DEMOCRACY NEWSLETTER, no. 3, Mar. 2009 (Salah Shehadeh was a member of the Hamas. He masterminded numerous terror attacks against Israeli civilians and soldiers in the Gaza strip and within Israel; he was involved in the production of Qassam rockets fired against Israeli civilian targets, and in the smuggling of arms into the Gaza strip. As the leader of the Izz ad-Din al-Qassam Brigades military wing of the Hamas in Gaza, he was responsible for suicide attacks that caused the death of hundreds of Israeli civilians. On July 22, 2002, Israel executed a targeted killing operation directed at Shehadeh. An IDF aircraft dropped a one-ton bomb on Shehadeh's house, killing him and 14 other people, and injuring many civilians. The attack was widely criticized by governments and human rights organizations, including in Israel.).

108. *See* WAR CRIMES IN GAZA, *supra* note 49 at 50.

revolutionary who had served a ten-year sentence in Spanish prison for collaborating with the Basque terrorist group Euskadi Ta Askatasuna ("ETA") and was involved in most of the universal jurisdiction lawsuits filed in Spain, including those against U.S. officials.[109] By the end of January 2009, following Boyé's petition, the Spanish magistrate, Andreu, who identified an opportunity to follow his colleague Garzón[110] and to gain international publicity, issued a decision to open a criminal investigation against Benjamin Ben-Eliezer, former Minister of Defense; Dan Halutz, former Commander of the Israeli Air-Force; Moshe Ya'alon, former Chief of Staff of the Israeli Defence Force ("IDF"); Avraham Dichter, former Director of the General Security Service; Doron Almog, former General of the Southern Command of the IDF; Giora Eiland, former Chairman of the National Security Council and National Security Advisor; and Michael Hertzog, former Military Secretary of the Israel Minister of Defense.[111] Andreu determined that "the events may and *must* [emphasis added] be investigated by the Spanish courts" as the evidence suggested that Israel had engaged in a "disproportionate attack," based on the Spanish law of universal jurisdiction as interpreted by the Constitutional Tribunal to provide absolute jurisdiction.[112]

B. A War on the "War on Terror"

As in Belgium, the complainants carefully calculated the timing of the filing of this particular lawsuit, leaving no doubt as to its political nature: Operation Cast Lead, the IDF ground invasion of the Gaza Strip (December 2008-January 2009), ended a few days before Judge Andreu released his decision to open an investigation into the case.[113] World attention was focused on the Gaza Strip.[114] Israel was desperately "trying to fend off foreign censure over the civilian death toll" during that operation.[115] The U.N. Human Rights Council called for an international fact-finding mission to investigate the conduct of Israel,[116] while a network of European lawyers and pro-Palestinian activists prepared a list with the names and personal data of some two hundred Israeli soldiers, which was made

109. *See* Gregory Gordon, *Spanish UJ – From Pinochet to Purgatory?*, OPINIO JURIS (Jul. 24, 2009, 1:26 AM), http://opiniojuris.org/2009/07/24/spanish-uj-from-pinochet-to-purgatory/; *see also* Kern, *supra* note 100.

110. *See* Kern, *supra* note 100.

111. See Rosenzweig & Shany, *supra* note 107.

112. *Id.*

113. Preliminary Proceedings 157/2008, *Central Magistrates' Court Number Four of the High Court in Madrid* (Jan. 29, 2009); Kern, *supra* note 100.

114. PALESTINIAN CENTRE FOR HUMAN RIGHTS (PCHR), THE PRINCIPLE AND PRACTICE OF UNIVERSAL JURISDICTION: PCHR'S WORK IN THE OCCUPIED PALESTINIAN TERRITORY 7 (2010).

115. Kern, *supra* note 100.

116. Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the U.N. Fact-Finding Mission on the Gaza Conflict, ¶ 1975, U.N. Doc. A/HRC/12/48, (Sept. 25, 2009) [hereinafter Report of the United Nations Fact-Finding Mission on the Gaza Conflict] (The Report of the U.N. Fact Finding Mission on the Gaza Conflict (the so-called "Goldstone Report") indeed recommended states parties to the Geneva Conventions to "start criminal investigations in national courts, *using universal jurisdiction*." (italics added)).

available on a special website called *Israeli war criminals*.[117] A complaint dealing with an alleged war crime amounting to a "crime against humanity" that would lead to a foreign criminal investigation into the conduct of the IDF in the Gaza Strip in the past was a perfect legal ambush; it could set a significant precedent and focus maximum international attention that would put Israel under heavy public and diplomatic pressure at home and abroad.[118] Furthermore, unlike the complaint against Sharon and Yaron in Belgium, the specific context of the current complaint was meant to showcase the role of international criminal law in reviewing the legality of counter-terrorism measures employed by states involved in the "War on Terror" led by the United States and Israel.[119] The application of universal jurisdiction as a "weapon" to review counter-terrorism strategies[120] was meant to attract the sympathy and support of human-rights activists and INGOs as part of an "anti-western globalism [movement that used] international law to eat away at national sovereignty."[121] In this respect, an unfolding investigation would send a clear message that a state's response to terrorist attacks represented "a more serious violation of international law than the original act of terrorism."[122]

C. Delegitimizing Domestic Proceedings

Most importantly, plaintiffs filed the complaint in Spain while proceedings in Israel regarding the Shehadeh affair were still pending. The Israeli High Court of Justice ("HCJ"), which had determined that targeted killing operations were not forbidden as such,[123] nevertheless had recommended the establishment of a special, independent examination committee with a mandate to examine the collateral damage caused by the killing of Shehadeh and its possible implications.[124] The committee, which was authorized to recommend disciplinary or criminal proceedings, had yet to conclude its investigation when the complaint in Spain was filed.[125] In fact, just a few days before the submission of the lawsuit by the PCHR

117. Anshel Pfeffer, *Lawyers in EU draw up list of alleged IDF war criminals*, HAARETZ (Oct. 27, 2009, 1:36 AM), http://www.haaretz.com/print-edition/news/lawyers-in-eu-draw-up-list-of-alleged-idf-war-criminals-1.5386.

118. *See* Kern, *supra* note 100.

119. *See* Rosenzweig & Shany, *supra* note 107.

120. For a discussion of the risks of such strategy and its legal implications, *see id.*, at "Conclusions."

121. Kern, *supra* note100.

122. Rosenzweig & Shany, *supra* note 107, at "Conclusions."

123. The HCJ further determined that every case that involved civilian casualties had to be examined by a special committee. *See* HCJ 769/2 Pub. Comm. Against Torture in Israel v. Gov't of Israel (2) PD 459, 511 [2006] (Isr.).

124. The legality of the Shehadeh operation has been discussed in several cases before the HCJ, but was challenged directly in HCJ 8794/03 Yoav Hess et al. v. Judge Advocate General et al. [2008] (Isr.). Pursuant to the Court's recommendation, the Israel Prime Minister established the Special Examination Committee, headed by Z. Inbar, the former Judge Advocate General and the Knesset Legal Advisor.

125. The Committee started its work in January 2008, and presented its final conclusions in February 2011. The Committee's Chairman, Z. Inbar, passed away during the Committee's work, and was replaced by former Supreme Court Judge T. Strasberg-Cohen. For the conclusions of the special examination committee on the targeted killing of Shehadeh, *see A Summary Report of the Special*

in Madrid, the HCJ rejected a petition calling for a criminal investigation of the Shehadeh affair due to the fact that the examination committee was still investigating the matter.[126] Obviously, the PCHR was trying to bypass the Israeli legal system by inviting an unprecedented foreign scrutiny of, and possible intervention in, its proceedings. Aside from establishing a dangerous precedent, a court trial in Spain would have implied that Israeli authorities were "unable or genuinely unwilling"[127] to handle the matter, while at the same time focusing public attention on the examination committee and exerting considerable pressure on its members.

As one could have expected, once Judge Andreu decided to take on the investigation, matters unfolded rapidly, attracting a great deal of international attention and causing political turbulence in and outside of Spain. The day after Andreu's preliminary decision, Spanish Foreign Minister Miguel Angel Moratinos, being aware of the far-reaching implications of the decision against U.S. officials, was quick to declare that the Spanish government would consider a proposal to amend the law on universal jurisdiction.[128] Andreu, backed by other prominent politicians who upheld Spanish judiciary's absolute independence,[129] was determined, however, to continue the official investigation in the case.[130] Israeli politicians protested in strong language against what they considered a conspicuous intervention by the Spanish court in the ongoing legal proceedings in Israel.[131] They were outraged further by the "ridicule and absurdity" of accusing a "democracy legitimately protecting itself against terrorists and war criminals," instead of going after the terrorists themselves.[132] In addition, they were incensed by the possibility that Andreu could decide to issue international arrest warrants for

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Committee to examine the action of prevention-focused Salah Shehadeh, PRIME MINISTER'S OFFICE (Feb. 27, 2011), http://www.pm.gov.il/PMO/Archive/Spokesman/2011/02/spokeshchade270211.htm.

126. See HCJ 8794/03, *supra* note 124.

127. Rome Statute of the International Criminal Court, *supra* note 16 at art. 17(1)(a) & (b) (following the wording of the article). Recall in this regard that, although the "Goldstone Report" had initially raised "serious doubts about the willingness of Israel to carry out genuine investigations as required by international law" (*see* Report of the United Nations Fact-Finding Mission on the Gaza Conflict, *supra* note 116, at ¶ 1961), in an April 2011 Washington Post Op-Ed, Goldstone admitted, "If I had known then what I know now, the Goldstone Report would have been a different document." Furthermore, Goldstone determined that Israel had fulfilled "to a significant degree" its responsibility to investigate "transparently and in good faith the incidents referred to in our report," while the "Hamas ha[d] done nothing." Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASHINGTON POST, (Apr. 1, 2011), http://articles.washingtonpost.com/2011-04-01/opinions/35207016_1_drone-image-goldstone-report-israeli-evidence.

128. Kern, *supra* note 100; Ido Rosenzweig & Yuval Shany, *Update—Universal Jurisdiction: Spanish Court's Inquiry of the Targeted Killing of Salah Shehadeh*, TERRORISM AND DEMOCRACY NEWSLETTER, no. 5, May 2009 [hereinafter Rosenzweig & Shany, Spanish Court's Inquiry]; Langer, *supra* note 1 at 38.

129. Kern, *supra* note 100 (such as Deputy Prime Minister Maria-Teresa Fernandez de la Vega).

130. *See* Rosenzweig & Shany, Spanish Court's Inquiry, *supra* note 128.

131. *See* Nicolaou Garcia, *supra* note 46 (quoting Ehud Barak, then Israel Defense Minister, "he would do anything to annul the decision").

132. Kern, *supra* note 100 (quoting incoming Prime Minister Netanyahu).

any of the Israeli senior officials and military officers, who could then be detained upon arrival in any E.U. member state.[133]

In April 2009, the Spanish prosecution requested that the Madrid Court dismiss the investigation, due to the ongoing, parallel investigation in Israel.[134] Judge Andreau refused, declaring that Israel was not conducting a criminal investigation and that Spanish law provided for simultaneous jurisdiction to investigate "war crimes."[135] The prosecution immediately appealed the decision to the Spanish Court of Appeals, which decided to revoke the investigation due to lack of universal jurisdiction over the matter in June.[136] Backing the position of the prosecution, the Court determined that a substantial, minimal link or national interest was required in order to implement universal jurisdiction that was otherwise incompatible with the fundamental principle of non-intervention in other states' affairs.[137] The court further concluded that Israel had jurisdictional priority in this case and that a genuine investigation that was subject to a judicial review was already underway.[138]

D. Déjà Vu . . .

During this time, in March 2009, just before the Spanish prosecution requested that Judge Andreu halt his investigation, a group of human rights lawyers filed a lawsuit with Judge Garzón of the *Audiencia*, against six senior U.S. Bush-administration officials, including the former U.S. Attorney General, Alberto Gonzales.[139] The complaint charged the so-called "Bush Six" with giving legal cover for the torture of terror suspects at Guantanamo Bay.[140] The case, which was one of several legal actions taken against U.S. administration officials overseas but the first to go to court thus far, exerted tremendous pressure on the Spanish political and legal systems.[141] In conjunction with the lawsuit against the Israeli officials, it threatened to turn Spain's national court into a "global court,"[142] serving as a plaything for competing political interests.[143] Finding itself in the very

133. *See id.*

134. Rosenzweig & Shany, Spanish Court's Inquiry, *supra* note 128.

135. *Id.*

136. Ido Rosenzweig & Yuval Shany, *Update on Universal Jurisdiction: Spanish Court of Appeals Decides to Close the Inquiry into the Targeted Killing of Salah Shehadeh*, TERRORISM AND DEMOCRACY NEWSLETTER, no. 8, July 2009 [hereinafter Rosenzweig & Shany, Spanish Court Closes Inquiry].

137. *Id.*

138. *See id.* (reviewing the minority opinion).

139. *See* Paul Haven, *Spain: No Torture Probe of US Officials*, ASSOCIATED PRESS (Apr. 17, 2009), http://www.realclearworld.com/news/ap/international/2009/Apr/17/spain_no_torture_probe_of_us_officials.html. Another judge of the *Audiencia* was already investigating whether secret CIA flights to or from Guantanamo entered Spanish airspace or landed at Spanish airports.

140. *Id.*

141. Gordon, *supra* note 109.

142. *Id.*

143. *See* Haven, *supra* note 139 (using the words of Candido Conde-Pumpido, Spain's top law-enforcement official).

awkward position of the Belgian authorities just a few years earlier and risking its role as a player on the international stage,[144] the Spanish government proposed new legislation in May 2009, intended to limit the law on universal jurisdiction.[145]

Despite all of the above, the PCHR had yet to give in, zealously deciding to appeal the decision of the Court of Appeals to the Spanish Supreme Court.[146] Backed by INGOs, such as Human Rights Watch, that were witnessing the beginning of the fall of Madrid as the capital of global justice,[147] in the beginning of 2010, the PCHR published a report entitled *The Principle and Practice of Universal Jurisdiction*.[148] This report outlined the "inadequacies of the Israeli judicial system" that "does not meet necessary international standards with respect to the effective administration of justice."[149] It concluded that "universal jurisdiction constitutes an essential, long established component of international law" and "it does [not] represent an attempt to interfere with the legitimate affairs of the State; it is enacted as a last resort" and "is the only available legal mechanism capable of ensuring Palestinian victims right to an effective judicial remedy. In the broader context, universal jurisdiction is also an essential tool in the fight against impunity. . . . [It] is a stepping stone on the road to universal justice."[150] However, the PCHR's argument did not convince the Spanish Supreme Court, and in April 2010 the Spanish Supreme Court affirmed the decision of the Court of Appeals to dismiss Judge Andreu's investigation.[151] A further appeal to the Constitutional Court, although possible, was useless, particularly in view of the Spanish parliament passing a bill in November 2009, presenting far-reaching amendments to Spain's law that practically barred private litigants wishing to file politically sensitive lawsuits.[152]

The Spanish saga was instrumental—evidently more than the Belgian one—in demonstrating the high risks and costs involved in allowing individual magistrates

144. Gordon, *supra* note 109.

145. Rosenzweig & Shany, Spanish Court's Inquiry, *supra* note 128; WAR CRIMES IN GAZA, *supra* note 49 at 50.

146. Rosenzweig & Shany, Spanish Court Closes Inquiry, *supra* note 136.

147. Gordon, *supra* note 109.

148. Palestinian Centre for Human Rights, *supra* note 114.

149. *Id.* at 8.

150. *Id.* at 9-10. S*ee also* Langer, *supra* note 1, at 4.

151. *See Tribunal Supremo Sala de lo Penal*, AUTO 550/2010 (Mar. 4, 2010), http://estaticos.elmundo.es/documentos/2010/04/13/auto_gaza.pdf; Ido Rosenzweig & Yuval Shany, *Update on Universal Jurisdiction: Spanish Supreme Court Affirms Decision to Close Inquiry into Targeted Killing of Salah Shehadeh in Gaza*, TERRORISM AND DEMOCRACY NEWSLETTER no. 17, Apr. 2010 [hereinafter Rosenzweig & Shany, Spanish Supreme Court Affirms Decision] (the Court pointed out, *inter alia*, that the fact the appellants had initially filed their complaint before the Israeli courts inferred that they accepted the genuineness of the Israeli proceedings).

152. The reform to the Spanish law included three non-cumulative requirements for the application of universal jurisdiction: presence of the accused on Spanish territory; Spanish nationality of the victims; or other relevant connection to Spain. *See* Carlos Espósito, *Shrinking Universal Jurisdiction*, ESIL NEWSLETTER, Feb. 2010, at 2, *available at* http://www.esil-sedi.eu/sites/default/files/ESIL_SEDI_NEWSLETTER_Feb_2010.pdf.

to selectively decide on the application of universal jurisdiction proceedings,[153] particularly in complex contexts such as the global fight against terrorism and ongoing political and military conflicts.[154] The combination of activist judges, hungry for publicity, with the lack of legal safety valves proved to offer a very futile soil for the breeding of manipulative lawsuits by politically motivated interest groups and individuals. The powerlessness of the executive to review or to prevent malicious forum-shopping by alleged victims further emphasized the responsibility of states to exercise procedural rigor in enforcing their laws as well as the need to create appropriate mechanisms to resolve competing jurisdictional claims.[155] The next state to learn these lessons the hard way—that is, through manipulation of its legal system and ensuing diplomatic pressures—was the United Kingdom.

VI. THE PROCEEDINGS IN THE UNITED KINGDOM

The law allowing universal jurisdiction proceedings to be initiated in the United Kingdom was considerably narrower than the Belgian or the Spanish laws, requiring the presence of the accused on British soil before proceedings could effectively commence.[156] In any case, under the system of "private prosecution," the law allowed any individual to initiate a criminal proceeding, even without having any connection to the alleged offence, before a magistrate who could then issue a summons or an arrest warrant to a visiting foreign official; all that was required was mere *prima facie* evidence.[157] Practically, such arrangements could hardly lead to actual court trials against Israeli officials within the United Kingdom.[158] Nevertheless, pro-Palestinian groups realized the great potential of manipulating the British legislation in an endeavor to disrupt the diplomatic relations with Israel. Harassing Israeli officials and top generals thus became part of the "well organized, well resourced and concerted attempt" that was "taking place in Britain to demonize, criminalize, and delegitimize Israel in every area of public life,"[159] and it was publicly supported by British politicians,[160] as well as by judges.[161]

153. Some commentators pointed out that the *Audiencia* judges had never sought to prosecute any Hamas or Fatah terrorists, or crimes against humanity committed in Chechnya or Darfur, for example, or any suspected Nazi war criminals who had sought refuge in Spain after WWII. *See* Kern, *supra* note 100.

154. See, *e.g.*, Jouet, *supra* note 18, at 528, 531.

155. *Id.* at 513-14, 526, 531, 535.

156. *See Recent Legislation*, *supra* note 46, at 1554-55; *see generally* Langer, *supra* note 1, at 15-19.

157. *Recent Legislation*, *supra* note 46, at 1555.

158. WAR CRIMES IN GAZA, *supra* note 49, at 50; Prosor, *supra* note 46, at 36.

159. Prosor, *supra* note 46, at 36, 46.

160. WAR CRIMES IN GAZA, *supra* note 49, at 5-8.

161. Prosor, *supra* note 46, at 36.

A. Challenging Customary International Law

In early 2004, an application for an arrest warrant against then Israeli Defense Minister Shaul Mofaz was submitted to the Bow Street Magistrates' Court.[162] The application was based on a complaint initiated by the PCHR, on behalf of families who had been affected by what was described as "'[t]he assassination policy of Israel' or the 'Policy of Shooting with Impunity'," accusing Mofaz of committing "grave breaches" of the Fourth Geneva Convention.[163] Mofaz was believed to be visiting the United Kingdom at the time.[164] Clearly, the PCHR meant for the complaint to challenge the decision of the ICJ in the *Arrest Warrant* case, which did not explicitly mention an incumbent Minister of Defense among the high-ranking officials enjoying absolute state immunity under customary international law.[165] Eventually, the magistrate concluded that Mofaz, as a Defense Minister, was also entitled to immunity, based on an analogy to the position of Minister of Foreign Affairs and the logic of the ICJ's decision.[166] Nevertheless, despite the fact that he was therefore barred from reviewing the application, the District Judge, C.L. Pratt, did not hesitate to indicate that "the extensive evidence" supplied to him "could certainly amount to 'grave breaches.'"[167] This was a clear signal that applications against *former* officials would be welcomed by the British judiciary, which led pro-Palestinian groups to compile extensive evidence files against top Israeli generals and former leaders.[168]

B. International Legal Ambush

In August 2005, the PCHR[169] handed over evidence to the Metropolitan Police relating to alleged "grave breaches" of the Fourth Geneva Convention supposedly committed by Major General Doron Almog, former General of the Southern Command of the IDF.[170] Following an application to the Bow Magistrates' Court, an arrest warrant against Almog was issued in September by a Senior District Judge in relation to "The demolition of 59 houses in Rafah, Gaza strip, on 10 January 2002."[171] Due to leaked information, Almog, who was scheduled to speak at a synagogue in Birmingham on the day after the arrest warrant was issued, did not disembark from the plane, but instead flew straight back to Israel, escaping the police awaiting him at Heathrow airport.[172] Israeli

162. *Application for Arrest Warrant against General Shaul Mofaz*, *supra* note 32.

163. *Id.* at ¶ 1-2.

164. *Id.* at ¶ 1.

165. Case Concerning the Arrest Warrant, *supra* note 7, at ¶ 51.

166. *Application for Arrest Warrant against General Shaul Mofaz*, *supra* note 32, at ¶¶ 10-15.

167. *Id.* at ¶ 3.

168. Nicolaou Garcia, *supra* note 46.

169. *Id.* (in collaboration with Daniel Machover and Kate Maynard from Hickman and Rose Solicitors (UK)).

170. *Id.*; *Recent Legislation*, *supra* note 46 at 1555.

171. Nicolaou Garcia, *supra* note 46; Langer, *supra* note 1, at 17.

172. Nicolaou Garcia, *supra* note 46. Ali Abunimah, *Israeli War Crimes Suspect Cancels London Visit*, ELECTRONIC INTIFADA (July 2013), http://electronicintifada.net/blogs/ali-abunimah/israeli-war-crimes-suspect-cancels-london-visit (it was reported that Almog had decided to cancel another visit to

generals, as well as top officials and politicians, were subsequently advised to refrain from visiting the United Kingdom.[173]

In December 2009, a British magistrate issued another arrest warrant against former Foreign Minister Tzipi Livni upon pro-Palestinian activist groups' allegations that she had commissioned "war crimes" in Gaza.[174] Livni, then leader of Israel's opposition, cancelled her planned visit to the United Kingdom.[175] The diplomatic rift between Israel and the United Kingdom was mounting, as Israel retaliated by halting its routine, high-level "Strategic Dialogue" with the British government[176] and by cancelling Deputy Prime Minister Dan Meridor's visit to Britain.[177]

C. Déjà Déjà Vu

Livini's near-arrest marked a turning-point in dealing with the abuse of British proceedings,[178] leading to intense political and academic debate, domestically and abroad. Both Labour and Conservative leaders, having realized the high costs of maintaining the system of "private prosecution" in universal jurisdiction proceedings and fearing their further implementation by low-level judges against U.S. and other foreign officials, vowed to change the law.[179] U.K. officials admitted that exploitation of the criminal procedure could "bring [the U.K.] legal system into disrepute."[180] The Legal Task Force of the Scholars for

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the UK in June 2013, despite an assurance of immunity by British authorities, following an action by PCHR lawyers challenging the decision of the U.K. government to grant Almog's visit the status of "special mission" that in effect put Almog beyond the reach of the law). The PCHR challenged the decision "given the fact that it was made by the UK government despite the existence of a warrant for Almog's arrest on war crimes charges."

173. In September 2005, a complaint against Moshe Ya'alon and Dan Chalutz was filed in the U.K. by the human rights group Yesh Gvul for their involvement in the Shehadeh targeted killing operation. Ya'alon, who was invited to London in 2009, was advised to cancel his trip. Such was the case with Minister of Defense Ehud Barak, and Minister of Public Security, Avi Dichter. Maj. Gen. Aviv Kochavi, Military Intelligence Director, and Maj. Gen. Yohanan Locker, Military Secretary to the Prime Minister, also canceled their visits to the U.K. *See* Chris McGreal, *Israeli Ex-Military Chief Cancels Trip to UK over Threat of War Crimes Arrest*, GUARDIAN (Sept. 16, 2005, 6:56 PM), http://www.theguardian.com/world/2005/sep/16/israelandthepalestinians.warcrimes.

174. *See Recent Legislation*, *supra* note 46, at 1555 n.15.

175. *Id.* at n.16.

176. *Id.* at 1555-56.

177. Bennatan, *supra* note 41.

178. Reydams, *supra* note 9, at 26; *Recent Legislation*, *supra* note 46 at 1555.

179. *See* John Bellinger, *Britain Amends Universal Jurisdiction Law*, LAWFARE BLOG (Sep. 19, 2011), http://www.lawfareblog.com/2011/09/britain-amends-universal-jurisdiction-law/; Langer, *supra* note 1 at 18-19. John Chapin, *Universal Jurisdiction is Abused and Leads to International Friction, say Legal Scholars*, THE CUTTING EDGE NEWS, (Apr. 12, 2010), http://www.thecuttingedgenews.com/index.php?article=12101 (in March 2010, the British government declared that "the Crown Prosecution Service will take over responsibility for prosecuting war crimes and other violations of international law, ending the current system in which magistrates are obliged to consider a case for an arrest warrant presented by any individual.").

180. *See Recent Legislation*, *supra* note 46, at 1555 (quoting *House of Commons Fourth Sitting*, 20 Jan. 2011, Parl. Deb., H.C. (2011) 126 (UK)).

Peace in the Middle East also released a statement condemning the misuse of universal jurisdiction in the United Kingdom and elsewhere "in light of recent harassment of Israeli officials" and insisted upon reform.[181]

On the other hand, extensive lobbying by pro-Palestinian advocacy groups and politicians,[182] backed by various INGOs and human rights groups, such as the London-based Amnesty International, Human Rights Watch and the International Federation for Human Rights,[183] prolonged the political debates surrounding the passage of amendments to the law.

Nevertheless, in September 2011, the U.K. Parliament accepted the Police Reform and Social Responsibility Act, requiring approval by the U.K. Director of Public Prosecutions—the head of the U.K.'s Crown Prosecution Service—before a British court could issue a privately-sought arrest warrant for universal jurisdiction offences.[184] This practically meant that the issuance of a warrant required consultation with the Attorney General—the chief legal advisor to the Crown—as well as the Cabinet Ministers, for their views on "such an arrest and the impact that that might have on the U.K.'s national interest."[185] With this reform, the United Kingdom joined Belgium and Spain, both which, within less than a decade, drastically changed the scope of their laws on universal jurisdiction. Evidently, even the United Kingdom—a country that had not enacted too permissive a law in the first place—still could not resist the abuse of its legal system by politically interested groups, as well as the selectivity of interested judges.

VII. THE UNBEARABLE LIGHTNESS OF MANIPULATION: LESSONS AND FUTURE PROSPECTS

A. Universal Jurisdiction—A Simple Concept?

"Universal jurisdiction is a simple concept;"[186] it "constitutes an essential, long established component of international law"[187]—so goes the message

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181. Chapin, *supra* note 179.

182. *See* Bennatan, *supra* note 41; *see also* Oliver Miles, *How International Law Affects the Palestine 'Peace Process'*, THE GUARDIAN (Nov. 22, 2010, 6:59 AM), http://www.guardian.co.uk/commentisfree/2010/nov/22/international-law-palestine-peace-process.

183. *Universal Jurisdiction*, LIBERAL DEMOCRAT FRIENDS OF PALESTINE (Feb. 16 2011), http://ldfp.eu/universal-jurisdiction/. These organizations, as well as Liberty, Redress, Global Witness, and Justice (the British section of the International Commission of Jurists) issued a joint brief on Universal Jurisdiction in the U.K., expressing their grave concern that "any changes to existing law . . . will undermine the capacity of victims of serious international crimes to hold accountable alleged perpetrators . . . by making all arrest decisions in such cases subject to political considerations rather than being based on the legal merits." *See also* Richard Irvine, *UK Rewrites War Crimes Law at Israel's Request*, ELECTRONIC INTIFADA, (Oct. 1, 2011), http://electronicintifada.net/content/uk-rewrites-war-crimes-law-israels-request/10446.

184. *Recent Legislation*, *supra* note 46, at 1554. (thus separating universal jurisdiction proceedings from the arrest warrant procedures for domestic crime).

185. *Id.* at 1557. *See also* Principle of 'Universal Jurisdiction' Again Divides Assembly's Legal Committee; Further Guidance Sought from International Law Commission, *supra* note 20 (statement of Douglas Wilson, U.K.).

186. Irvine, *supra* note 183.

delivered by the PCHR, echoing some prominent INGOs.[188] Nothing is more remote from the truth,[189] as a quick look into the discussions on universal jurisdiction, which were held at the U.N. Sixth Committee (Legal) within the last few years, demonstrates. Across the board, delegates note "the divergent views and practices, the evolving nature of the principle, and new substance being given to it," and the need for a "cautious approach [to] be taken" in dealing with the complex issues involved.[190] They warn that the "limitless application" of universal jurisdiction might lead to "conflicts of jurisdiction between States, to subjecting individuals to procedural abuses, or to politically motivated judicial prosecutions."[191] They call for an "unbiased application" of the principle in order to "prevent its selective application or exploitation . . . for settling political scores"[192] and note the need for "[f]urther clarification and consensus-building" to "strengthen the application of universal jurisdiction" and "give legitimacy and credibility to its usage."[193] Paradoxically, it has been the particularly extensive activity of pro-Palestinian interest groups that has exposed just how complex and unsettled the principle of universal jurisdiction is; this activity has been highly instrumental in demonstrating to all and sundry within the international community—legislators, politicians, judges and the general public—the dangers of its unrestrained application, as well as the lack of consensus surrounding its implementation.

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187. Palestinian Centre for Human Rights, *supra* note 114, at 9.

188. *See, e.g.*, INTERNATIONAL FEDERATION OF HUMAN RIGHTS, FIDH POSITION PAPER TO THE UNITED NATIONS GENERAL ASSEMBLY AT ITS 64TH SESSION 10 (2009), *available at* http://www.fidh.org/IMG/pdf/FIDH_Position_Paper_to_the_GA_-_64.pdf (claiming that universal jurisdiction is "*firmly enshrined* in international treaty and customary law") (emphasis added); *see also* Reydams, *supra* note 9, at 28; *Basic Facts on Universal Jurisdiction*, HUMAN RIGHTS WATCH (Oct. 19, 2009), http://www.hrw.org/print/news/2009/10/19/basic-facts-universal-jurisdiction ("[T]he *vast majority* of states recognize *the validity* of the concept of universal jurisdiction, as they are parties to *conventions that provide for it*.") (emphasis added); AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: STRENGTHENING THIS ESSENTIAL TOOL OF INTERNATIONAL JUSTICE 8 (Oct. 2012) (Amnesty International calls upon states to "uphold their commitment to universal jurisdiction, *a long-established rule of international law*, and reaffirm the *duty* of every state to exercise its jurisdiction over crimes under international law . . . *regardless where they have been committed and the nationality of the suspects and victims*.") (emphasis added).

189. *See* Reydams, *supra* note 9, at 10-24.

190. Meetings Coverage, General Assembly, Delegations Urge Clear Rules to Avoid Abuse of Universal Jurisdiction Principle, U.N. Doc. GA/L/3441 (Oct. 17, 2012) (statement of Anniken Enersen, Norway); *see also* Principle of 'Universal Jurisdiction' Again Divides Assembly's Legal Committee; Further Guidance Sought from International Law Commission, *supra* note 20 (statements by representatives of Brazil, Tunisia, and the U.S.) (noting the "ambiguity surrounding the concept"); Legal Committee is Told 'Principle of Universal Jurisdiction' Needs to be Refined, to Avoid Possible Abuses, Politicization, U.N. Doc. GA/L/3372 (Oct. 21, 2009) (statement of Hossein Sadat Meidani, Iran).

191. Delegations Urge Clear Rules to Avoid Abuse of Universal Jurisdiction Principle, *supra* note 190 (statement of Fernanda Millicay, Argentina).

192. *Id.* (statement of Grace Eyoma, Nigeria).

193. *Id.*

B. The High Price of Manipulation

Within a very short period of time, the three leading states that had adopted *different* modules of laws which allowed their courts to establish universal jurisdiction proceedings had to amend their legislation. Due to political manipulation, mostly against Israel, and later against the United States, all three came to realize that such proceedings could be a double-edged sword.[194] They consequently limited the scope of their laws in a way that either altogether barred foreign individuals and groups from bringing lawsuits which bore no link to the forum state or provided for substantial executive scrutiny of judicial decision-making. Unfortunately, some of these far-reaching amendments might eventually undermine the original notion of universal jurisdiction and thereby defy the interests of international justice by preventing the application of the principle, even in appropriate cases of exceptional character, where the prosecution of international crimes and mass atrocities is truly warranted and justified.[195] In particular, the requirement of a certain link to the forum state—that is, beyond the mere presence of the accused—seems to be irrelevant to the original concept of universal jurisdiction, thus undermining its fundamental idea of prosecution on the basis of the universally acknowledged heinousness of the criminal conduct.

Manipulation of universal jurisdiction has thus created a backlash against human rights organizations and activists, which provided broad, unqualified support to pro-Palestinian groups' abuse of proceedings in their "lawfare" campaigns against Israel.[196] In the words of Reydams, such activity thus showed, "[U]niversal jurisdiction was anything but universal in practice. As an almost exclusively European affair [it] represented a curious mixture of *mission civilisatrice and resistance against United States Hegemony and Israeli exceptionalism*."[197] Supporting—or downright manufacturing—headline-making "virtual cases"[198] against former senior officials, rather than strengthening international criminal law, made a mockery of it.[199] Instead of promoting a transnational worldview and upholding global victimhood principles, it facilitated the introduction of state-centric mechanisms and domestically-centered valuation of international claims.[200] West-European "universal jurisdiction campaigns" should therefore serve as a resounding lesson for groups seeking either to promote one-sided political agendas and gain publicity under the guise of promotion of

194. *See, e.g.*, Bennatan, *supra* note 41.

195. *See, e.g.*, Espósito, *supra* note 152.

196. *See Basic Facts on Universal Jurisdiction*, *supra* note 188 (some leading INGOs still insist that there is no abuse and manipulation of the doctrine in the case of Israel).

197. Reydams, *supra* note 9, at 27. *Cf.* Langer, supra note 1, at 46 (suggesting that although "politics necessarily plays a role in universal jurisdiction . . . universal jurisdiction criminal proceedings . . . have tended to be true adjudicatory processes").

198. Reydams, *supra* note 9, at 24. A term coined by Reydams to describe headline-making NGO-driven cases against a host of (former) senior officials, which, with the exception of Pinochet, "produced little more than headlines and diplomatic headaches (and fame for a Spanish judge)."

199. *Id.* at 28.

200. *Recent Legislation*, *supra* note 46, at 1557.

human-rights and a global rule of law or to push too hard towards the "end of nationhood" by undermining the sovereignty of certain states.[201]

C. Unsettled Doctrine

In 2001, in their Joint Separate Opinion in the *Arrest Warrant* case,[202] ICJ Judges Higgins, Kooijmans, and Buergenthal presented a very supportive position regarding the evolving *right* of national jurisdictions to exercise universal jurisdiction *in absentia*. In their opinion—probably the most powerful formal statement in favor of universal jurisdiction coming from prominent international lawyers—the Judges in fact suggested that, according to contemporary customary international law, a state may *choose* to assert jurisdiction over particular offences committed elsewhere by persons having no relationship or connection with that state.[203]

This observation, stated in the course of reviewing the legality of the Belgian law before it was amended, was remarkable in view of the fact that—as the Judges noted—there was no established practice at the time, in which states exercised universal jurisdiction.[204] The Judges thus admitted that "virtually all national legislation envisaged links of some sort to the forum State" and that "no case law exist[ed] in which pure universal jurisdiction had formed the basis of jurisdiction."[205] This, however, did not necessarily indicate, in the eyes of the Judges, that such an exercise would be unlawful, since "a State is not required to legislate up to the full scope of the jurisdiction allowed by international law."[206]

Further relying on "contemporary trends, reflecting international relations as they stand at the beginning of the new century,"[207] the Judges jointly determined that:

> [W]hile none of the national case law to which we have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an *opinio juris* on the illegality of such a jurisdiction. In short, national legislation and case law—that is, State practice—is neutral as to exercise of universal jurisdiction.[208]

In view of the developments that followed, such an assertion would be impossible to sustain today. It would amount to a proposition that customary law—

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201. *See, e.g.*, Kern, *supra* note 100; *see also* Mallat, *supra* note 44, at 189-90 (who framed his petition in Belgium in the context of the fight for a so-called Kantian "cosmopolitan justice" in the face of economic forces that "wreak havoc with peoples' lives.").

202. Case Concerning the Arrest Warrant, *supra* note 7, at 63 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

203. *Id.* at 80, ¶ 59.

204. *Id.* at 76, ¶ 45.

205. *Id.*

206. *Id.*

207. *Id.* at 76, ¶ 47. According to the Judges, "contemporary trends" outline a "movement towards bases of jurisdiction other than territoriality."

208. *Id.* ¶ 45.

or in the words of the Judges, "the full scope of jurisdiction allowed by international law"—develops in complete detachment from evolving state practice. Furthermore, the fact that the main—and only—jurisdictions that allowed for the exercise of universal jurisdiction "in its pure form," or close to that, later revised their legislation to require a certain link to the forum state is a clear indication regarding the evolving *opinio juris* on the matter. It thus became clear that state practice is no longer neutral regarding the possibility of exercising universal jurisdiction *in absentia,* without even some connection to the forum state. This has now become obvious not only as a matter of legal doctrine, but also as a matter of political reality, in a way that indicates an evident change in "contemporary trends reflecting international relations."[209]

It is also important to note that even Judges Higgins, Kooijmans, and Buergenthal required certain safeguards that were essential in their view to prevent abuse of universal jurisdiction-based proceedings. These included the protection of international immunities, as well as giving the national state of the prospective accused the first opportunity to act upon the charges concerned.[210] More significantly, the Judges determined that "such charges may only be laid by a prosecutor or *juge d'instruction* who acts in full independence," without links to or control by the government of the forum state.[211] Reality, however, proved that reliance on the independence of the judiciary—although logical as a matter of legal theory—was one of the main causes for manipulation and abuse of universal jurisdiction. This led most national legislators to require the strict review and approval by relevant government or prosecution officials as a pre-condition for the exercise of jurisdiction by national authorities.

Altogether, it is obvious today that, although the general concept of universal jurisdiction is generally recognized under international customary law, its meaning and application cannot be left to evolve customarily. Rather, it requires an explicit, meticulous determination within a comprehensive international effort, most likely in the form of a draft international treaty that would, first and foremost, settle in detail the issue of jurisdictional priorities that have proved to be highly sensitive and delicate. This would most likely impact other controversial matters that remain largely unresolved, such as the authority to exercise jurisdiction—or even to initiate a criminal investigation—*in absentia*, as well as the scope of sovereign immunity that restricts national proceedings. Such an international instrument may also provide some guidance regarding the level of national authority—whether judicial, political, or both—that should be vested with the discretion to decide on national proceedings.[212] Evidently, despite what was advocated by certain

209. *See* text accompanying *supra* note 207.

210. *Id.* at 80, ¶ 59-60 (they also considered it necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community).

211. *Id.* ¶ 59.

212. *See, e.g.*, Langer, *supra* note 1, at 46-47 (considering the issue of the desirable level of prosecutorial discretion and control by the executive branch over prosecutors to be critical; it is particularly crucial in view of the fact that "selectivity is such a structural feature of universal jurisdiction.").

publicists,[213] decisions regarding these and related issues, that bear a tremendous impact on inter-state relations, cannot be left to national legislators to make.

D. Asymmetric Application and Political Agendas

Most of the complaints brought against Israeli (and United States) senior officials were intentionally framed in the context of, and as a means for undermining, the fight against terrorism. They consequently exposed the normative paradoxes involved in the asymmetric application of international criminal arrangements. The fact that universal jurisdiction typically deals with so-called "crimes of state" and the liability of state officials,[214] not with offences committed by non-state actors and terrorists, still presents a significant challenge that shadows the lofty goals underlying the doctrine. This is all the more true in a world where the fight against the malignant phenomenon of global terrorism is not shared evenly by states, and where there is still no broadly accepted definition—let alone political consensus—regarding terrorist activity.[215] It also raises deep

213. *See, e.g.*, SHAW, *supra* note 11, at 672 (regarding the requirement of the presence of the accused in the forum state). Since in the case of universal jurisdiction, the national authority to initiate proceedings derives from international law, all issues that bear a direct impact on the extent of such authority—and therefore on the rights of the defendant—must be settled and determined under international law, and cannot be left to the discretion of the national authorities (unless mitigating factors are concerned). *See, e.g.*, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal with Commentaries, Rep. of the Int'l L. Comm'n, 2nd Sess., Y.B. Int'l L. Comm'n, 1950, Vol. II, at 374-75, ¶ 99, 102, 104, 106.

214. Much like the ICC in this regard. Paradoxically, as Schabas notes, one of the strongest arguments for excluding crimes such as terrorism from the jurisdiction of the ICC is that they "do not suffer from a problem of impunity in a manner similar to that of other categories," such as genocide, crimes against humanity, war crimes, and aggression, being typically "state crimes," perpetrated by governments themselves or with their complicity, and therefore went unpunished. SCHABAS, *supra* note 15, at 98. Universal jurisdiction, on the other hand, was originally predicted on the ground that certain crimes (such as piracy, slave-trade and traffic in children and women) were often committed by non-state actors and in *terra nullius*, where no state could exercise territorial jurisdiction. *Id.* at 64.

215. *See* BRYNJAR LIA, GLOBALIZATION AND THE FUTURE OF TERRORISM: PATTERNS AND PREDICTIONS 9-15 (2005). Lia acknowledges that terrorism has long been a controversial term and that, although "there has been a considerable resurgence in terrorism studies during the 1990s, and especially after 9/11," as well as a growing consensus in academia on the definitional issue, "[s]till basic conceptual and methodological questions remain unresolved" and no generally accepted definition of terrorism exists. *Id.* at 10-11. He further acknowledges the "strong tendency to label anti-Western and anti-Israeli violence, including attacks on military targets, as terrorism." *Id.* at 11. According to Lia, the most widely used definition of terrorism is the one used by the U.S. Department of State in its annual report, *Patterns of Global Terrorism*, where terrorism is defined as "premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience." *Id.* at 11 (quoting U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM xii (2003)). He also notes that, "[g]iven the definitional and conceptual problems of studying terrorism generically, one has argued that it is better to use a political definition of terrorism, namely illegal violent activities practiced by groups listed as outlawed terrorist organizations by the USA and more recently by the European Union." *Id.* at 14. Schabas notes that, proposals at the Rome Conference to include terrorism as a category of international crimes under the jurisdiction of the ICC did not meet with sufficient consensus. SCHABAS, *supra* note 15, at 96. He foresees that, since it becomes increasingly evident that the ICC will only be able to deal with a very limited number of cases, it is "entirely unrealistic to think that new criminal law paradigms, such as . . . terrorism could be added

concerns regarding the future application of universal jurisdiction in the context of other controversial "state crimes," such as that of aggression.[216]

Furthermore, in this regard, some commentators wanted to use universal jurisdiction-based petitions against Israeli officials abroad as an incentive for the conduct of "genuine and effective" *domestic* legal proceedings that would allegedly defend officials from foreign claims.[217] There is surely no doubt that prompt, objective, and effective domestic proceedings and investigations into alleged violations of human rights and humanitarian law are of crucial importance, a national interest indeed. Nevertheless, if anything, the short but highly dense history of proceedings against Israelis abroad suggests that domestic proceedings are *not* an effective barrier against the abuse of foreign proceedings.[218] Once lawsuits abroad are motivated, first and foremost, by political and propaganda considerations, anything less than maximal prosecution will always leave room for the argument that domestic proceedings are conducted "unwillingly" and "ineffectively," or designed to get the defendant "off." In this way, as Kontorovich observed, "while a prosecution" by the home state "cannot be undone by others, decisions to *not* prosecute can be nullified by other states' decisions to prosecute," and extra-judicial settlements can easily be ignored.[219] Consequently, a state showing the slightest sign of being inclined to conduct domestic proceedings due to fear of foreign lawsuits will most probably be inviting even more complaints from abroad, risking foreign scrutiny of, and even possible intervention in the conduct of domestic proceedings.[220] Such a development is particularly dangerous in the context of the fight against terrorism, due to the "limited appreciation of the unique dilemmas posed by terrorism and counter-terrorism."[221]

E. Controversial Involvement of INGOs and Interest Groups

The conduct of "universal jurisdiction campaigns" against Israelis abroad also demonstrates the potential risks involved in the participation of certain INGOs and interest groups in the conduct of future domestic proceedings and investigations.

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to the jurisdiction." *Id.* at 97. Schabas further acknowledges that the problem with a distinct crime of terrorism lies in definition, explaining that "[t]errorism seems to have more to do with motive than with either the mental or physical elements of a crime, and this is something that is not generally part of the definitions of offences." *Id.* Some argue that terrorist acts may fall within the scope of crimes against humanity or even war crimes, but there is no consensus on this point. *Id*, at 15.; *See also* CASSESE, *supra* note 11, at 162-64, 171-77.

216. *See generally* Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L.J. 357 (2012).

217. Rosenzweig & Shany, Spanish Supreme Court Affirms Decision, *supra* note 151.

218. *See, e.g.*, George P. Fletcher, *Against Universal Jurisdiction*, 1 J. OF INT'L CRIM. JUST. 580, 582-83 (2003).

219. Kontorovich, *supra* note 34, at 404 (on the problematic application of the principle of *non bis in idem* ("double jeopardy") in the context of universal jurisdiction).

220. This is all the more so today, once there is no international agreement on the complex issue of competing proceedings, and probably until a comprehensive multilateral treaty on universal jurisdiction is concluded. *See, e.g.*, Esposito, *supra* note 152; REYDAMS, *supra* note 18, at 16.

221. *See* Rosenzweig & Shany, Spanish Court's Inquiry, *supra* note 107.

Undoubtedly, these actors benefitted greatly from their intense involvement in universal jurisdiction high-profile, politically controversial cases, gaining publicity, funds and membership.[222] Today, when most of the relevant countries have effectively closed their doors before foreign private litigants,[223] the motivation of interest groups to find and apply alternative channels of prosecution, such as the ICC and home-state domestic legislation, is probably high. This means that any consideration of new domestic investigation and prosecution proceedings will certainly require serious evaluation of the proper procedural mechanisms and legal safety valves required to ensure that such proceedings are not easily abused and manipulated. Such an endeavor will probably require consideration of complementary legislation regarding, *inter alia*, interest groups' sources of funding and support for terrorism. At the same time, international judicial institutions, such as the ICC, should be highly aware of not letting themselves be manipulated by parties to political conflicts and by their proponents, thus undermining their legitimacy and credibility.[224]

VIII. CONCLUSION

Despite the enduring controversy regarding its content, limits, and modus operandi, universal jurisdiction is an important concept and is here to stay. It could—and should—evolve into a cornerstone of the multilateral endeavor to end impunity and to bring justice to victims of the most atrocious of crimes. It is therefore all the more unfortunate that "lawfare" in the form of universal jurisdiction campaigns has set back the cause of international global justice in this regard. Indeed, some commentators argue that universal jurisdiction had become a mere "self-feeding hype generated by NGOs, activist lawyers and judges, academic conferences and papers, and mass-media."[225] This may go too far. Nevertheless, it is a powerful reaction in the face of the unbearable lightness of political manipulation. If universal jurisdiction is to be meaningful in the future, the lessons regarding the ease with which international law can be exploited and

222. *See* Byers, *supra* note 3, at 439-40.

223. Still, the amended Belgian law, for example, can be easily abused by litigants who are Belgian nationals or residents, although this is not considered anymore a universal jurisdiction case due to the link of the alleged victims to Belgium. Such was the case with the two Belgian activists who were reported to file a war crimes complaint over the "flytilla" incident, against Prime Minister Binyamin Netanyahu, former Minister of Interior, Eli Yishai, former Minister of Defense, Ehud Barak, and former Chief-of-Staff, Gabi Ashkenazi, in January 2012. *See* Ali Abunimah, *Two Belgians File War Crimes Complaint against Israeli Leaders over 'Flytilla' Abuse*, ELECTRONIC INTIFADA (Jan. 18, 2012, 1:57 PM), http://electronicintifada.net/blogs/ali-abunimah/two-belgians-file-war-crimes-complaint-against-israeli-leaders-over-flytilla-abuse/.

224. *See, e.g.*, Eugene Kontorovich, *Israel/Palestine—the ICC's Uncharted Territory*, 11 J. OF INT'L CRIM. JUST, 979 (2013); David Kaye, *Who's Afraid of the International Criminal Court? Finding the Prosecutor Who Can Set it Straight*, FOREIGN AFFAIRS, May/Jun. 2011, http://www.foreignaffairs.com/articles/67768/david-kaye/whos-afraid-of-the-international-criminal-court.

225. Reydams, *supra* note 9, at 27. *See also* Langer, supra note 1, at 5.

diverted from its true objectives,[226] turning it into an "international lynch-law,"[227] must resound.

226. *See, e.g*, Hirsch & Kumps, *supra* note 40, at 24.

227. Jouet, *supra* note 18, at 537 (quoting the former British Prime Minister, the late Margaret Thatcher); *see also* Kissinger, *supra* note 2.

IS THERE A PLACE FOR US?: PROTECTING FAN FICTION IN THE UNITED STATES AND JAPAN

Samantha S. Peaslee[*]

I. INTRODUCTION

Susan sits down at her computer, a stack of her favorite books next to her, and begins to write. Dumbledore[1] and Gandalf[2] are sitting calmly in the Leaky Cauldron,[3] wondering about the mysterious stranger that called them there. As they wait, Captain Kirk,[4] Professor X,[5] and George Clooney[6] join them at the table,

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1. Dumbledore is a character in J.K. Rowling's Harry Potter series. This series is the most popular to turn into fan fiction on Fanfiction.net, with 676,000 stories. *Books Harry Potter*, FANFICTION.NET, https://www.fanfiction.net/book/Harry-Potter/ (last visited Nov. 8, 2014).

2. Gandalf is a character created by J.R.R. Tolkien. He appears in the Lord of the Rings series and the Hobbit. These two have a combined 57,200 fan fictions on Fanfiction.net. *Books Lord of the Rings*, FANFICTION.NET, https://www.fanfiction.net/book/Lord-of-the-Rings/ (last visited Nov. 8, 2014); *Books Hobbit*, FANFICTION.NET, https;//www.fanfiction.net/book/Hobbit/ (last visited Nov. 8, 2014).

3. The Leaky Cauldron is a pub in J.K. Rowling's Harry Potter series.

4. Captain Kirk is a character in the Star Trek series. He appears in both new Star Trek films, as well as many of the series. The Star Trek universe has a combined 56,200 fan fictions on Fanfiction.net. *Movies Star Trek: 2009*, FANFICTION.NET, https://www.fanfiction.net/movie/Star-Trek-2009/ (last visited Nov. 8, 2014); *TV Shows StarTrek: Deep Space Nine*, FANFICTION.NET, https://www.fanfiction.net/tv/StarTrek-Deep-Space-Nine/ (last visited Nov. 8, 2014); *TV Shows StarTrek: Enterprise*, FANFICTION.NET, https://www.fanfiction.net/tv/StarTrek-Enterprise/ (last visited Nov. 8, 2014); *TV Shows StarTrek: Other*, FANFICTION.NET, https://www.fanfiction.net/tv/StarTrek-Other/ (last visited Nov. 8, 2014); *TV Shows StarTrek: The Next Generation*, FANFICTION.NET, https://www.fanfiction.net/tv/StarTrek-The-Next-Generation/ (last visited Nov. 8, 2014); *TV Shows StarTrek: The Original Series*, FANFICTION.NET, https://www.fanfiction.net/tv/StarTrek-The-Original-Series/ (last visited Nov. 8, 2014); *TV Shows StarTrek: Voyager*, FANFICTION.NET, https://www.fanfiction.net/tv/StarTrek-Voyager/ (last visited Nov. 8, 2014).

5. Professor X is a character in Marvel's X-Men series. X-Men has a total of 27,800 fan fictions between the comics and the movies on Fanfiction.net. *Comics X-Men*, FANFICTION.NET, https://www.fanfiction.net/comic/X-men/ (last visited Nov. 8, 2014); *Movies X-Men: The Movie*, FANFICTION.NET, https://www.fanfiction/net/movie/X-Men-The-Movie/ (last visited Nov. 8, 2014); *Movies X-Men*, FANFICTION.NET, https://www.fanfiction.net/movie/x-men (last visited Nov. 8, 2014).

all with the same mysterious note, calling them together to ask them for help. Suddenly, a tall, beautiful woman walks into the Leaky Cauldron with a more normal-looking girl next to her, looking distraught. The beautiful woman introduces herself as Mary Sue, and then announces dramatically that she and her friend need the help of these men to save the world.

Hypothetical Susan is one of thousands of fans who write fan fiction. Although fan fiction is not a new phenomenon,[7] the Internet has made writing and reading fan fiction more accessible and popular.[8] Now, certain databases are devoted exclusively to fan-written works that reimagine books, movies, television shows, comics, and even real people.[9]

With the overwhelming number of fan fiction written and posted on the Internet, the owners of the original works cannot help but take notice. With the rise of Internet fan fiction came the simultaneous rise of cease and desist letters to fans and website operators.[10] A small minority of owners, such as Anne Rice,

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6. George Clooney is an actor, director, and producer. He is the subject of 17 stories on Fanfiction.net. *Story George Clooney*, FANFICTION.NET, https://www.fanfiction.net/search.php?keywords=george+clooney&ready=1&type=story (last visited Nov. 8, 2014).

7. *Wide Sargasso Sea* was a 1966 novel that retold Jane Eyre from the viewpoint of Rochester's mad wife Bertha. *See Wide Sargasso Sea (Penguin Modern Classics)*, AMAZON.CO.UK, http://www.amazon.co.uk/gp/product/0141182857/ref=as_li_ss_tl?ie=UTF8&camp=1634&creative=19450&creativeASIN=0141182857&linkCode=as2&tag=thesolipsocia-21 (last visited Sept. 21, 2014) (describing *Wide Sargasso Sea* as Jean Rhys's "grand attempt to tell what she felt was the story of *Jane Eyre's* 'madwoman in the attic,' Bertha Rochester"). *Rosencrantz and Guildenstern are Dead* is a play based on Shakespeare's Hamlet from the viewpoint of two minor characters. *See Rosencrantz and Guildenstern are Dead*, AMAZON.COM, http://www.amazon.com/Rosencrantz-Guildenstern-Are-Dead-Stoppard/dp/0802132758/ref=sr_1_1?ie=UTF8&qid=1411357706&sr=8-1&keywords=rosencrantz+and+guildenstern+are+dead (last visited Sept. 21, 2014) (describing *Rosencrantz and Guildenstern are Dead* as "the fabulously inventive tale of Hamlet as told from the worm's-eye view of the bewildered Rosencrantz and Guildenstern, two minor characters in Shakespeare's play"). Star Trek fanzines were common throughout the 1990s, providing a place for Trekkies to disseminate their fan fiction. *See FanZines: Introduction*, STAR TREK FANZINES, http://www.sttos.net/sttos/eng/zines.php (last visited Sept. 21, 2014). *See also* Michelle Chatelain, *Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works, and the Fair Use Doctrine*, 15 TUL. J. TECH. & INTELL. PROP. 199, 199-200 (2012); Meredith McCardle, *Fan Fiction, Fandom, and Fanfare: What's all the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 441 (2003).

8. Chatelain, *supra* note 7, at 200; Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of 'Mary Sue' Fanfiction as Fair Use*, 95 Cal. L. Rev. 597, 600 (2007); Ernest Chua, *Fan Fiction and Copyright: Mutually Exclusive, Coexistable or Something Else? Considering Fan Fiction in Relation to the Economic/Utilitarian Theory of Copyright*, 14 MURDOCH U. E LAW J. 215, 215 (2007).

9. Chatelain, *supra* note 7, at 200 (providing the example of Fanfiction as one of the databases). *See* FANFICTION, http://www.fanfiction.net (last visited May 12, 2014) (linking to millions of fan fiction stories in nine categories). *See generally*, HARRY POTTER FANFICTION, www.harrypotterfanfiction.com (last visited May. 12, 2014) (providing fan fiction that is exclusively for Harry Potter fan fiction and contains over 80,000 stories); ONE DIRECTION FANFICTION, http://onedirectionfanfiction.com (last visited May 12, 2014) (providing a site devoted to fan fiction about the pop band One Direction; it contains over 48,000 stories).

10. McCardle, *supra* note 7, at 441.

expressly forbids fiction based on their works, going to the extent of sending regular cease-and-desist letters to the managers of fan fiction databases as well as authors.[11] Overall, these cease and desist letters do not seem to curb the increased popularity of fan fiction, nor have they led to any court cases.[12] Some owners choose to forbid only select fan fiction, such as homosexual depictions of heterosexual characters, commercial fan fiction, or fan fiction that strictly copies large portions of works.[13] Other owners of original works have either explicitly or implicitly approved fan fiction.[14] J.K. Rowling, for example, has generally tolerated non-commercial and web-based fan fiction based on her characters.[15] Paramount, which owns the Star Trek franchise, ultimately decided not to pursue legal action against fan-writers, even when it does not approve of the fan fiction.[16]

Owners of original novels, television stories, or movies ("rights owners" or "owners") are adamant against fan fiction because it is almost certainly a violation of an owner's intellectual property rights. However, Internet fan fiction raises unique issues for these owners. Despite most intellectual property rights being territorially bound, activities on the Internet generally are not. When the original work is from one country, the fan-writer in another, and the fan fiction is on the Internet, it creates a unique conundrum for both the rights owners and the fan-writers in attempting to determine the legality of the fan-writers' actions and each party's respective rights. This difference is made especially poignant when the countries involved are civil and common law nations.[17]

This paper will take the hypothetical case from the first paragraph of this paper and attempt to determine what would happen if any of the rights owners sued Susan under either U.S. or Japanese intellectual property law. As the two countries

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11. Chander & Sunder, *supra* note 8, at 618; Chatelain, *supra* note 7, at 201. Anne Rice's site includes an "important message" on fan fiction: "I do not allow fan fiction. The characters are copyrighted. It upsets me terribly to even think about fan fiction with my characters. I advise my readers to write your own original stories with your own characters. It is absolutely essential that you respect my wishes." *Anne's Messages to Fans*, ANNERICE.COM, http://annerice.com/ReaderInteraction-MessagesToFans.html (last visited Sept. 14, 2014).

12. Chander & Sunder, *supra* note 8, at 618; Chatelain, *supra* note 9, at 201.

13. Tiffany Lee, *Fan Activities from P2P File Sharing to Fansubs and Fan Fiction: Motivations, Policy Concerns and Recommendations*, 14 TEX. REV. ENT. & SPORTS L. 181, 183, 185 (2013) (providing the example that Paramount does not allow strict copying of its works). *See also* Paramount Pictures Corp. v. Carol Publ'g. Grp.,11 F. Supp. 2d 329, 333 (S.D.N.Y. 1998). *See also* McCardle, *supra* note 7, at 441 (explaining Lucasfilms is well known for having sent a cease-and-desist letter to a fanzine that published pornographic fan fiction of Star Wars.).

14. McCardle, *supra* note 7, at 449-50; Lee, *supra* note 13, at 184.

15. Chander & Sunder, *supra* note 8, at 611; Darren Waters, *Rowling Backs Potter Fan Fiction*, BBC NEWS, http://news.bbc.co.uk/2/hi/entertainment/3753001.stm (last updated May 27, 2004, 12:11 PM).

16. Chander & Sunder, *supra* note 8, at 611. The first clash between fan fiction authors and copyright owners occurred in June 1977 when Paramount sent a cease and desist letter to a Star Trek fanzine, but then dropped the case when it learned the fanzine was not a professional publication. McCardle, *supra* note 7, at 441.

17. Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 213 (2006).

that are arguably the largest producers of fan fiction,[18] as well as two examples of different cultural and legal mentalities in regards to intellectual property, examining the reactions of these two states may have very real impacts on fans and rights owners in the future.

Part II will define types of fan fiction before Part III discusses the choice of law analysis in which rights owners must engage before determining whether to apply U.S. or Japanese intellectual property law. The next three sections will go through the intellectual property laws in both the United States and Japan as they apply to potential issues raised by fan fiction: Part IV will discuss copyright law, Part V will discuss trademark law, and Part VI will discuss moral rights. The conclusion will suggest the best ways for each country to legally address fan fiction.

II. WHAT IS FAN FICTION?

Fan fiction cannot be considered one cohesive category. Meredith McCardle points out that "the various forms fan fiction can take are wildly different and do not lend themselves to orderly classification."[19] Even within sub-classifications of fan fiction, individual characteristics may distinguish one particular story from another, making it more or less infringing. This section will outline the basics of fan fiction that are necessary to understand the legal distinctions throughout this paper.

A. Basic Fan Fiction

Fan works are a general category that includes any creation of a fan based upon an identifiable segment of popular culture.[20] These include fan art (fan depictions of original characters or settings),[21] fan videos (as simple as music video montages or as complicated as full reenactments of popular movies or stories),[22] and fan subs (fan-translated videos that were originally in a language different from that of the target fan audience).[23]

Professor Rebecca Tushnet has defined fan fiction as "any kind of written creativity that is based on an identifiable segment of popular culture, such as a

18. Actual statistics of how much fan fiction each country produces are currently unavailable.

19. McCardle, *supra* note 7, at 437. Meredith McCardle is a particularly intriguing source on the legal aspects of fan fiction as she is a former attorney who is now a young adult fiction author.

20. Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction and a New Common Law*, 17 LOY. L.A. ENT. L. J. 651, 655 (1997).

21. *See, e.g.*, DEVIANTART, http://www.deviantart.com/browse/all/fanart/ (last visited May 14, 2014).

22. *See, e.g.*, *A New Hope: Uncut*, STAR WARS UNCUT, http://www.starwarsuncut.com/newhope (last visited Sept. 21, 2014) (a compilation of fan videos of Star Wars Episode IV: A New Hope).

23. *See, e.g.*, DOKI FANSUBS, doki.co (last visited Sept. 21, 2014). *See generally* Sean Kirkpatrick, *Like Holding a Bird: What the Prevalence of Fansubbing can Teach us about the use of Strategic Selective Copyright Enforcement*, 21 TEMP. ENVTL. L. & TECH. J. 131 (2003).

television show, and not produced as 'professional' writing."[24] Others have defined fan fiction as "fiction written by a fan for the Internet about a person, fictional character, or universe of which the person is a fan."[25] The Oxford English Dictionary ("OED") defines it as "fiction written by a fan of, and featuring characters from, a particular TV series, movie, etc."[26] This paper will use the OED definition, as it includes both commercial and non-commercial aspects, while Professor Tushnet's definition limits fan fiction to those works written only for non-commercial reasons.

All fan fiction builds some sort of new story from the original.[27] Some of the simplest fan fiction fills in narrative gaps in the source material or conveys the source material from the viewpoint of a different character.[28] A Harry Potter novel told from Hermione's perspective would fit into this category. Other times, the fan fiction will act as a prequel or sequel.[29] Fan fiction about James Potter (Harry's father) or Harry's children would fall into this category. Alternate universe fan fiction is another popular category. In alternate universe fan fiction, the characters from canon are presented in an environment very different to the original, such as moving Harry Potter to the United States or India.[30] Crossover fan fiction is also very popular; Susan's story in the introduction is an example of crossover fiction. Crossover fiction is when the characters, storylines, or settings from multiple canons are combined in a single fan work.[31]

One popular reason for creating fan fiction is to create relationships (called "shipping") between characters. When the fan work involves a heterosexual relationship between two characters that may or may not be romantically linked in the original, the work is called gen/het (general/heterosexual) fan fiction.[32] If Harry and Hermione fall in love in a fan fiction story, that is gen/het fiction. All of these genres of fan fiction are generally inoffensive to owners (as long as the works are not for profit).

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24. Tushnet, *supra* note 20, at 655. Professor Tushnet has written a number of works on fan fiction and the law, but also on intellectual property law in general. *See also* McCardle, *supra* note 7, at 434; Chua, *supra* note 8, at 216.

25. Christina Z. Ranon, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VAND. J. ENT. & TECH. L. 421, 422 (2006).

26. *Fan fiction*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/fan-fiction (last visited May 14, 2014).

27. Chatelain, *supra* note 7, at 200-01.

28. *Id.*

29. *Id.* at 201.

30. McCardle, *supra* note 7, at 436. *See also 'Potter in Calcutta' Banned*, BBC NEWS (Apr. 30, 2003), http://news.bbc.co.uk/2/hi/south_asia/2988673.stm.

31. Chatelain, *supra* note 7, at 201. *See, e.g.*, *Book Crossovers FanFiction*, FANFICTION.NET, http://www.fanfiction.net/crossovers/book/ (last visited May 12, 2014).

32. McCardle, *supra* note 7, at 436.

B. Slash Fiction

The other type of relationship-based fan fiction is "slash" fiction. Slash fiction features two characters that are usually heterosexual in canon engaged in a homosexual relationship.[33] This type of fan fiction is responsible for most of the ire from otherwise tolerant intellectual property owners. Part of this is because slash fiction carries with it "a slough of misconceptions."[34] The key misconception is that slash fiction is pornography under another name.[35] Most slash fiction, however, centers on the relationship itself, not the sexual relationship between the two characters.[36] One example of slash fiction would be if, in Susan's story, Gandalf and Dumbledore fell in love and got married. While many rights owners do not perceive slash as harmful, some consider this a perversion of their original characters.[37]

C. Mary Sue

Original character fan fiction is common as well. Original character fan fiction involves inserting a new, fan-invented character into the owner's plot. Susan's fan fiction has two original characters: Mary Sue and her friend. But while the friend is a generic original character, generally considered harmless and occasionally necessary to the plot, Mary Sue is "the much loathed and widely ridiculed 'Mary Sue.'"[38]

Mary Sue originally referred to a character created by Trekkie Paula Smith in her fan fiction—the first woman to control a Star Trek spaceship.[39] While some scholars view Mary Sue as a social commentary character, fans often view her with more scorn.[40] Mary Sue has come to stand for an author inserting oneself into a story, but as a character who is "typically perfect in nearly every way imaginable. Beautiful, intelligent, and quick-witted, these characters usually come equipped with a certain disregard for rules and normally wind up stealing the heart of a main canon character."[41] In Susan's fan fiction, "Mary Sue" likely represents Susan's perception of what she would like to be, while the friend may be a more realistic version of Susan herself or just a necessary extra. Most of fandom is scornful of the Mary Sue, yet she is still the most easily identifiable character in fan fiction.[42]

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33. *Id.*

34. *Id.* at 443.

35. *Id.* Another misconception is common in China, where the belief reins that writing and reading slash fiction "promotes homosexuality." Aja Romano, *For Young Women in China, Slash Fanfiction is a Dangerous Hobby*, DAILY DOT (Apr. 18, 2014), http://www.dailydot.com/geek/in-china-20-people-women-arrested-for-writing-slash/(explaining that as a result of this belief, authorities have arrested some young twenty-year-olds for writing slash fiction).

36. McCardle, *supra* note 7, at 443.

37. *Id.* at 464.

38. *Id.* at 436.

39. Chander & Sunder, *supra* note 8, at 597.

40. *Id.* at 608.

41. McCardle, *supra* note 7, at 436.

42. *Id.* at 437.

D. Doujinshi

While some might believe that *doujinshi* (sometimes transliterated as *dojinshi*) is merely the Japanese word for fan fiction, it has developed into its own category. *Doujinshi* "traditionally refers to works such as poetry or short stories for distribution within a specific association or society,"[43] but currently is understood to mean "manga or anime featuring characters not originally created by the author."[44] The distinguishing feature of *doujinshi*, besides it now being specific to manga and anime, is that fans typically sell their *doujinshi* at special conventions.[45] While regular fan fiction is not necessarily non-profit, very little fan fiction is as inherently commercial as *doujinshi*.

E. Real Person Fiction

Real person fiction is a relatively new phenomenon. Now some fan fiction databases have sections for "Celebrities & Real People" or "Music & Bands."[46] While the volume of these databases is not as substantial as the fan fiction databases, some fan fiction sites designed for single bands or actors are just as extensive as regular fan fiction.[47] While many of these works would not traditionally infringe intellectual property, the broadening scope of trademark law may protect the people who are subjects of these fictions. This article will not discuss real person fiction in depth, nor will it discuss the fate of George Clooney in Susan's fan fiction, but it is important to note this rising phenomenon in the discussion of fan fiction.

Regardless of the type of fan fiction, all of it could potentially infringe intellectual property rights. Determining whose rights are infringed, how much infringement occurred, the type of infringement, and potential defenses, might be dependent on the type of fan fiction.

III. CHOICE OF LAW IN FAN FICTION DISPUTES

If an owner of an original work, such as J.K. Rowling, Paramount, or Marvel, discovers Susan's fan fiction on the Internet and chooses to sue her, the owner would need to first determine the law under which it had a claim. The choice of law can be crucial—it may make a difference as to whether Susan has infringed any rights in the first place or whether she has any defenses under that law. Although some international tactics do govern intellectual property, intellectual

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43. Mariko A. Foster, *Parody's Precarious Place: The Need to Legally Recognize Parody as Japan's Cultural Property*, 23 SETON HALL J. SPORTS & ENT. L. 313, 315 (2013); Salil Mehra, *Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches are Japanese Imports?*, 55 RUTGERS L. REV. 155, 164 (2002).

44. Foster, *supra* note 43, at 315. *See also* Mehra, *supra* note 43, at 164; Kirkpatrick, *supra* note 23, at 147.

45. Kirkpatrick, *supra* note 23, at 147.

46. *See, e.g.*, ARCHIVE OF OUR OWN, archiveofourown.org (go to "Fandoms" drop down menu; then "Celebrities & Real People" and "Music & Bands" hyperlinks) (last visited Mar. 6, 2014).

47. *See, e.g.*, ONE DIRECTION FAN FICTION, http://onedirectionfanfiction.com (last visited May 15, 2014) (containing almost 50,000 fan fictions based solely on the band).

property is still a domestic issue, so even if infringement takes place in multiple countries, individual national laws must be used, not international laws.

Choice of law for Internet activities such as fan fiction is more difficult in this territorial system. The Internet allows "[a]cts that potentially violate exclusive copyrights [and other intellectual property rights to] instantaneously and simultaneously occur in several countries."[48] If the use of a work protected by intellectual property implicates laws of multiple jurisdictions, choice of law determines which rules apply.[49]

Whether a right to be infringed exists is often the easy determination in a case such as Susan's. The law that applies to the *existence of a right* is the one under which the intellectual property is registered.[50] If the Harry Potter series, Star Trek series, and X-Men series are protected by registered copyright or trademark, the applicable law is any (or all) of the intellectual property laws of the state in which it is protected. The Berne Convention—the international convention on intellectual property—also extends protection to works registered in one signatory state under the laws of other signatories.[51]

The more difficult choice of law issue is what law is applicable to the *infringing act.* Typically, intellectual property choice of law follows a strictly territorial approach,[52] meaning the courts must look to the location of where the alleged acts occurred to decide questions relating to infringement.[53] The Internet makes this strict territorial application difficult.[54] Often, the infringement occurs in multiple places, by way of the Internet, requiring a court to apply the copyright laws of each country in which infringement occurred.[55]

In our example, assume Susan is in Japan. The owners of the protected portions of her work have existing rights wherever their intellectual property is registered—so probably both the United States and Japan. Therefore, either law could apply in determining the existence of intellectual property rights. The next question is which law is applicable to Susan's infringing acts. Writing fan fiction in Japan potentially infringes the owners' reproduction and derivative works rights in Japan. Then Susan uploads her fan fiction onto Fanfiction.net. This could infringe upon the authors' distribution rights—but where? Susan is in Japan, the servers for Fanfiction.net are at an unknown location in the United States,[56] and the

48. Andreas P. Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 MICH. J. INT'L L. 799, 800 (1998).

49. *Id.* at 802.

50. Itar-tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 89 (2d Cir. 1998); AMERICAN LAW INST., INTELLECTUAL PROP.: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES §301(1)(a) (2008).

51. Berne Convention for the Protection of Literary and Artistic Works, art. 2(6), Sept. 9,1886, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 223 (amended Sept. 28, 1979) [hereinafter Berne Conv.].

52. Reindl, *supra* note 48, at 803.

53. *Id.*

54. *Id.* at 800.

55. *Id.* at 806.

56. *Terms of Service*, FANFICTION.NET, http://www.fanfiction.net/tos/ (last updated Mar. 5, 2009).

people who read Susan's fan fiction are in various locations throughout the world. Distribution probably occurs in the location of the server, but an argument could be made that distribution occurs wherever the readers are located. The protected works are then protected wherever they are registered (probably both Japan and the United States), but infringement definitely occurred in Japan, probably occurred in the United States, and may have occurred in even more countries.

Based on this, it is easy to understand why "applying strictly territorial choice of law rules to global digital networks creates formidable problems."[57] Unfortunately, this is still the first hurdle that those seeking to prosecute fan fiction—and possibly even those seeking to protect it—must pass.

Assuming the rights owners have determined the choice of law and find they have multiple options, they may want to consider the cultural implications of the laws under which they would like to sue, as well as the venue in which they would like to bring suit. Comparing the United States and Japan as societies, the United States is generally more litigious.[58] The United States also has extensive discovery processes and strong remedies for rights owners who prove infringement.[59] Moreover, the U.S. legal system emphasizes the economic purposes of intellectual property law which are designed to provide an incentive for people to create.[60] Japan, on the other hand, is a more communicative, less litigious society. The Japanese prefer not to go straight to court, but instead to "first go through the process of conciliation and apology. . . ."[61] Once a suit is filed, no discovery is available and the process is very slow, often resulting in limited or ineffectual damages.[62] Additionally, Japan's intellectual property law emphasizes the importance of intellectual property as cultural property and the creative rights of authors rather than the economic bases for protection.[63] These factors make it more likely that rights owners—who typically want strong remedies and extensive discovery—are more likely to want U.S. law to apply and U.S. courts to hear their claims based on cultural-legal differences alone. Whether the law makes that the better option is a different question.

IV. COPYRIGHT AND FAN FICTION

When one thinks of fan fiction, the first category of intellectual property that comes to mind is copyright. The Berne Convention protects "literary and artistic

57. Reindl, *supra* note 48, at 807.

58. *See generally* Geoffrey R. Scott, *A Comparative View of Copyright as Cultural Property in Japan and the United States*, 20 TEMP. INT'L & COMP. L.J. 283 (2006).

59. *Id.* at 359.

60. Bird & Ponte, *supra* note 17, at 247; Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 603 (2001).

61. Kirkpatrick, *supra* note 24, at 149; Lee, *supra* note 13, at 186; Richard V. Burgujian, *Enforcement of Intellectual Property Rights in Japan*, *in* Robert Bae, *Intellectual Property in the Pacific Rim Countries: Rights and Remedies*, 91 AM. SOC'Y INT'L L. PROC. 395, 397 (1997).

62. Burgujian, *supra* note 61, at 395-97; Kirkpatrick, *supra* note 23, at 149.

63. Foster, *supra* note 43, at 332; Scott, *supra* note 58, at 312.

works"[64] by authors who are nationals of one of the signatories to the Berne Convention.[65] As this category includes books and other writings, dramatic works, and cinematographic works,[66] it encompasses the majority of works on which fan fiction is based. Since both the United States and Japan are signatories to the Berne Convention,[67] they are both bound to provide protection to works that fall within these categories.

The Berne Convention sets forth the minimum standards that each signatory must provide to protected works. These include the right of reproduction of protected works,[68] the right of authorizing adaptations, arrangements, or alterations of works (called the derivative right in the United States),[69] and the right to control distribution of protected works.[70] The Berne Convention generally provides these rights for the duration of the life of the author plus fifty years.[71] It also allows states to provide some exceptions to these protections through fair or free use.[72]

Ultimately, however, copyright protection is a matter of domestic legislation. So it is important to look at the protections within the United States and Japan itself to determine whether fan fiction generally infringes copyright in either of these states.

A. United States

Determining whether a work infringes an owner's copyright requires a two-part inquiry.[73]

The first question is always whether the original work is copyrightable subject matter.[74] If it is, the second question is whether the fan work infringes the owner's rights.[75]

1. Is the Original Work Copyrightable Subject Matter?

In the United States, copyright protection is available to "original works of authorship fixed in any tangible medium of expression."[76] While some categories

64. Berne Conv., *supra* note 51, art. 1.

65. *Id.* art. 3(1)(a).

66. *Id.* art. 2(1).

67. *Berne Convention for the Protection of Literary and Artistic Works*, WIPO-ADMINISTERED TREATIES, http://www.wipo.int/treaties/en/ip/berne/ (follow "Contracting Parties" hyperlink) (last visited May 14, 2014).

68. Berne Conv., *supra* note 52, art. 9(1).

69. *Id.* art. 12.

70. *Id.* art. 14(1).

71. Berne Conv., *supra* note 51, art. 7(1). Note that certain works have different durations. *Id.* art. 7(2), (3).

72. Berne Conv., *supra* note 51, arts. 9(2), 10, 10bis.

73. Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co., 900 F. Supp. 1287, 1292 (C.D. Cal. 1995); Kathryn M. Foley, *Protection Fictional Characters: Defining the Elusive Trademark-Copyright Divide*, 41 CONN. L. REV. 921, 926 (2009).

74. Metro-Goldwyn-Mayer, 900 F. Supp. at 1296; Foley, *supra* note 73, at 927.

75. Metro-Goldwyn-Mayer, 900 F. Supp. at 1297; Foley, *supra* note 73, at 927.

76. 17 U.S.C. § 102(a) (2014).

of protection are enumerated, such as literary works, dramatic works, motion pictures, and other audiovisual works,[77] works that meet the first criteria that do not otherwise fit within categories may also be included. The main limitation of copyright is that it will only protect expressions, not ideas.[78] The original works from which Susan took her story were the *Harry Potter* series, *The Lord of the Rings* trilogy, *Star Trek*, and *X-Men*. As a whole, all of these are protected as literary or audiovisual works, and are therefore protected subject matter.

Fan fiction considers another issue in copyrightable subject matter. While full original works can be copied in fan fiction, fans more commonly take only the characters or settings and build their own works from those elements. For example, the only aspect of *The Lord of the Rings* in Susan's story is Gandalf. Therefore, another issue is whether characters are independently copyrightable[79]—if so, owners may have an easier time showing infringement.

Fictional characters have entered the intellectual property spotlight lately as they have become such valuable assets for rights owners.[80] The case law regarding characters, unfortunately, remains rather confusing.[81] Two tests have emerged to determine whether characters are copyrightable: the "story being told" test and the sufficient delineation test.

The "story being told" test emerged in the famous "Sam Spade case" in the Ninth Circuit.[82] In that case, the Ninth Circuit claimed that Detective Sam Spade was not subject to copyright protection independent of his story, the *Maltese Falcon*, because he was "only the chessman in the game of telling the story."[83] If, however, Sam Spade had truly constituted the "story being told" rather than serving as a pawn in the story, he would have been entitled to independent protection.[84] Since the "Sam Spade case," the "story being told" test has not been used effectively. Courts have criticized the test,[85] refused to adopt the test,[86] or distorted the test to support the desired result.[87] Therefore, the second test, the sufficient delineation test, should apply when determining whether a character is copyrightable.

The sufficient delineation test was articulated by Judge Hand in *Nichols v. Universal Pictures Corp.*[88] In that case, Judge Hand decided that a fictional

77. *Id.* § 102(a)(1), (3), (6) (2014).

78. *Id.* § 102(b) (2014).

79. *See* McCardle, *supra* note 7, at 445-47.

80. *See* Foley, *supra* note 73, at 923, 937 ("[L]icensing of Walt Disney characters alone generates nearly $20 billion a year in retail sales."); Michael Todd Helfand, *When Mickey Mouse is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 STAN. L. REV. 623, 623, 626 (1992).

81. Tushnet, *supra* note 20, at 659.

82. Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945 (9th Cir. 1954).

83. *Id.* at 950.

84. *Id. See also* Foley, *supra* note 73, at 929.

85. Foley, *supra* note 73, at 929.

86. *Id.* at 930.

87. *Id.*

88. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

character could be protected "independently of the plot" in limited situations.[89] The situations in which he determined characters could be protected were when the characters were sufficiently delineated or developed to qualify as protectable expression rather than a mere compilation of ideas.[90] Further cases have used the sufficient delineation standard to determine that the more highly detailed the characters are, the more protection they deserve.[91]

While pictorial representations of characters were previously considered easier to delineate sufficiently than literary characters,[92] literary characters that are more than "mere delineation[s]" of basic ideas have been granted protection.[93] Judge Posner even determined that "no more is required for a character copyright" than a specific name and appearance.[94]

Based on the "story being told" test, none of the characters in Susan's fan fiction would be entitled to independent copyright protection, because none of them constitute the story being told. Under the sufficient delineation test, on the other hand, Gandalf, Dumbledore, Captain Kirk, and Professor X would all be entitled to copyright protection, as all four of them are very detailed, in-depth characters.[95] As courts are more likely to apply the sufficient delineation test, Susan uses copyright protected characters in her fan fiction.

2. Do the Fan Works Infringe upon the Copyright Owners' Rights?

Once a work or character is copyrighted, owners have certain rights relating to the copyrighted work. Fan fiction potentially infringes upon three of these: the right to reproduction,[96] the right to distribution,[97] and the right to authorize derivative works.[98]

Violating the right of reproduction means that the infringing work copies protected elements from the original work. When taking a character's name, image, and personality, infringement based upon reproduction can be assumed. In

89. *Id.*; Foley, *supra* note 73, at 927.

90. Helfand, *supra* note 80, at 631; Nichols, 45 F.2d at 121 ("[T]he less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.").

91. Anderson v. Stallone, 11 U.S.P.Q.2d 1161, 1166 (C.D. Cal. 1989). *See also* Chatelain, *supra* note 7, at 205.

92. Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978).

93. Detective Comics, Inc. v. Bruns Publ'ns., 111 F.2d 432, 433-34 (2d Cir. 1940) (deciding that when "the pictorial representations and verbal descriptions of Superman are not a mere delineation of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the author, they are proper subjects of copyright and susceptible of infringement . . . . ").

94. Gaiman v. McFarlane, 360 F.3d 644, 660 (7th Cir. 2004). *See also* Foley, *supra* note 73, at 932.

95. Additionally, as inanimate objects such as the Batmobile have been considered to be copyrightable, locations such as the Leaky Cauldron can also be assumed to be copyrightable if they are sufficiently delineated.

96. 17 U.S.C. § 106(1) (2012).

97. *Id.* § 106(3).

98. *Id.* § 106(2).

many fan fiction cases, fans admit to copying the characters and therefore violating the reproduction right; they then allege a defense to immunize themselves from liability for that copying.

Fan authors also typically concede infringements upon the owner's right to authorize derivative works. Creating a derivative work is using elements of a protected work to create a new work—essentially the definition of fan fiction.[99] In *Nichols*, the Court said that copying a character in this way, by moving it out of the original plot, would likely be sufficient to establish copyright infringement.[100] As with infringements of the reproduction right, most fans concede this and justify it by using defenses to infringement.

Finally, "when [a] fan fiction author . . . uploads his story onto the Internet and allows the public to access it, [he] has violated the owner's third exclusive right in distribution."[101] A fan infringes upon the distribution right merely by distributing copies of an owner's work without obtaining consent. By distributing works that already infringe the reproduction or derivative rights, it is assumed that the owner has not consented to that distribution.

Therefore, fan fiction is a prima facie infringement on an owner's copyright rights. Susan's fan fiction, which copies Dumbledore, Gandalf, and the others, creates a derivative work with them, then is distributed on the internet, is also infringing. However, Susan may be able to allege that she is protected by various defenses that immunizes her from liability for these violations.

3. Do Fans have any Defenses from Liability for Copyright Infringements?

In U.S. Copyright Law, some uses of copyrighted materials are permitted.[102] Fan fiction writers can use copyrighted characters in their stories if: (1) the copyright owner explicitly or implicitly permits fan fiction or (2) "the fan fiction constitutes fair use of the copyrighted work."[103] While very few authors have explicitly consented to fan fiction, implied consent is a very strong defense in certain fandoms.[104] If rights owners know about the fan fiction and allow it to continue, in all likelihood, the fan can show that the owner impliedly consented.[105] However, impliedly consenting to some types of fan fiction does not protect all possible versions of fan fiction. For example, J.K. Rowling is unopposed to most fan fiction, but she has brought suit before when the fan in question sells his or her work.[106]

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99. *See* Chatelain, *supra* note 7, at 205-06; McCardle, *supra* note 7, at 449.
100. Nichols, 45 F.2d at 121; Foley, *supra* note 73, at 933-34.
101. McCardle, *supra* note 7, at 448-49.
102. Chua, *supra* note 8, at 219.
103. Chander & Sunder, *supra* note 8, at 612.
104. McCardle, *supra* note 7, at 449-50.
105. *Id.* at 449.
106. Chander & Sunder, *supra* note 8, at 611.

Fair use is another viable defense for most fan fiction authors. Four factors interact to determine whether a fan can take advantage of the fair use defense:

(1) the purpose and character of the use . . . ;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion [of the copyrighted work] used [in the infringing work] in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.[107]

Generally, the more transformative the fan work is, the more likely it is fair use under the first factor.[108] Fan fiction is often not only transformative, but also non-commercial in nature. When fans create work without any desire to profit, the first factor weighs very heavily for fair use.[109] When, on the other hand, fans attempt to sell their fan fiction rather than merely posting it online, as *doujinshi* writers do, this may weigh against fair use.[110]

As to the second factor, creative works are typically more strongly protected than factual works and published works are afforded less protection than unpublished ones.[111] While most original works that fan fictions take from are published, they are also very creative, so this factor will almost always weigh in favor of the rights owner.

The third factor, the amount and substantiality of the portion of the copyrighted work used in the infringing work, is why the question of whether characters can be copyrighted is so important. If characters are a mere portion of a copyrighted work, they are a less substantial amount of the copyrighted work than if they are independently copyrightable subject matter. For example, when Susan used Dumbledore in her work, if Dumbledore is copyrightable, she copied the entirety of Dumbledore and, depending on how important of a role he plays in her fan fiction, possibly a very substantial portion of him. If, however, Dumbledore is not copyrightable, Susan copied a very small, probably less substantial, portion of the *Harry Potter* series in copying Dumbledore. Therefore, the determination on whether characters are independently copyrightable will ultimately decide the third fair use factor.

The fourth factor, the effect of the infringing work on the potential market of the original work, will be the hardest for a rights owner to move in his or her favor. The key here is "whether the infringing work 'usurps' the market of the original by serving as a substitute for the original author's work."[112] Being non-commercial helps the fan, as does the fact that fan fiction also almost never substitutes for the original.[113] In fact, fan fiction often does quite the opposite—it usually helps

107. 17 U.S.C. § 107; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

108. Chatelain, *supra* note 7, at 208.

109. Acuff-Rose, 510 U.S. at 578; Chatelain, *supra* note 7, at 208.

110. Acuff-Rose, 510 U.S. at 585; Chatelain, *supra* note 7, at 208.

111. Chatelain, *supra* note 7, at 209 (citing Blanch v. Koons, 467 F.3d 244, 256 (2d Cir. 2006)).

112. *Id.* at 211.

113. Chua, *supra* note 8, at 223.

encourage readers to return to the original works.[114] Fan authors are rarely, if ever, attempting to replace the existing work about which they care so much. Owners that attempt to argue for this factor may find themselves up against the uncomfortable reality that fan fiction can actually help their original work remain popular and relevant.

While no court has dealt with fan fiction yet, it is likely that fans will prevail on a fair use defense—which is one possible reason that no owners have brought suit against fan fiction writers in the United States. However, Japanese Copyright Law may result in a different outcome, giving owners a different venue in which they could attempt to uphold their rights.

B. Japan

Copyright regulations in Japan and the United States closely resemble each other, but there are some key differences that could prove important for rights owners and fans when dealing with fan fiction.[115]

1. Is the Original Work Copyrightable Subject Matter?

Similarly to U.S. Copyright Law, Japan's Copyright Law protects "production[s] in which thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or musical domain[,]"[116] including novels and cinematographic works.[117] As in the United States, the original works upon which Susan based her fan fiction would be protected in Japan. Because Japan is a civil law country, the statute embodying its Copyright Law is the full extent of the law; however, court cases can still be informative as to how the statute is interpreted. For example, the Japanese Supreme Court decision in *K.K. Matsudera v. King Features Syndiate, Inc.*, in which the court determined that fictional characters could receive copyright protection, indicates that characters may also be protected in Japan.[118] However, as the courts provided no test, the extent to which characters receive protection in Japan is uncertain.[119] Additionally, since *K.K. Matsudera* only involved graphic characters,[120] literary characters may receive less independent copyright protection in Japan than in the United States. Therefore, while the *Harry Potter* series, *The Lord of the Rings* trilogy, *Star Trek*, and *X-Men* receive copyright protection in Japan, the characters within them may not get their own protection.

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114. *See* Lee, *supra* note 13, at 187; Tushnet, *supra* note 20, at 669.

115. Mehra, *supra* note 43, at 166.

116. Chosakukenhō [Copyright Law of Japan], Law No. 43 of 2012, art. 2, para. 1(i) (Japan) (translated by Yukifusa Oyama et al. 2013) [hereinafter Japanese Copyright Law].

117. Japanese Copyright Law, art. 10(1)(i), (vii).

118. Mehra, *supra* note 43, at 173; K.K. Matsudera v. King Features Syndicate, Inc., Saikō Saibansho [Sup. Ct.] July 17, 1997, 1992 (o) no. 1443, *translated at* http://www.courts.go.jp/app/hanrei_en/detail?id=317 (Japan).

119. *See* K.K. Matsudera, 1992 (o) no. 1443.

120. Saikō Saibansho [Sup. Ct.] July 17, 1997, 1992 (O) no. 1443, http://www.softic.or.jp/en/cases/popeye.html (Japan).

2. Do the Fan Works Infringe upon the Copyright Owners' Rights?

The Japanese Copyright Law provides rights to owners of copyrightable works similar to those in the U.S. Copyright Act. In Japan, the owner is entitled to the right of reproduction,[121] the right of distribution,[122] and the right of derivative works.[123] Despite the right of distribution being limited to cinematographic works,[124] these works function in the same way as copyright infringements in the United States, so fans (and Susan) would still be liable for prima facie copyright infringement in Japan.

3. Do Fans have any Defenses from Liability for Copyright Infringements?

The defenses for fans in Japan are different from those in the United States. As a practical matter, rights owners do not crack down on fan works in Japan. Most animation studios are "small tightly woven families functioning on extremely tight budgets"[125] that do not have the resources to engage in legal disputes.[126] Additionally, fan works in Japan "make up an enormous and visible industry that has matured alongside the industry of original content production," making fandom more acceptable to owners.[127] Therefore, approval by authors is a particularly strong and often used defense in Japan.

Non-Japanese owners bringing suit in Japan may encounter other defenses that prevent them from proving infringement. Japan does not have an explicit fair use provision like the United States, but it does contain a "laundry list" of permitted use of copyrighted material.[128] Surprisingly, *doujinshi* is not included as a permitted use, but non-profit uses are included.[129] Not only does the Japanese Copyright Law allow for a limited amount of private use copying,[130] but it also has an exception that allows non-profit organizations to present a work already made public if that organization does not charge fees to view the work.[131] While neither of these fits fan fiction perfectly, as fan works are disseminated on the Internet and change aspects of the original rather than merely perform it, Japanese courts could choose to determine that the free posting of fan fiction on the Internet falls into these exceptions.

Based on this, rights owners may decide to bring copyright infringement cases against fans in Japan when possible, despite the cultural difficulties, because the

121. Japanese Copyright Law, art. 21.

122. *Id.* art. 26.

123. *Id.* arts. 27-28.

124. *Id.* art. 26.

125. Kirkpatrick, *supra* note 23, at 146 (citing ANTONIO LEVI, NEW MYTHS FOR THE MILLENNIUM: JAPANESE ANIMATION, ANIMATION IN ASIA AND THE PACIFIC (John A. Lent, ed. 2001)).

126. *Id.*

127. *Id.* at 146-47; Lee, *supra* note 13, at 185.

128. Mehra, *supra* note 43, at 175-76.

129. Japanese Copyright Law, arts. 30, 38.

130. *Id.* art. 30.

131. *Id.* art. 38.

law is more likely to find for the owners. While infringement would occur in both countries, the United States' strong fair use defense would probably impede finding infringement, while no such explicit defense exists in Japanese law.

V. TRADEMARK AND FAN FICTION

An entire story may not be covered by trademark, but that is part of what makes trademark ideal for owners looking to protect their characters if copyright claims fail. While some courts have commingled trademark and copyright analyses recently, trademark can provide strong protections for rights owners looking to protect characters used in fan fictions. Unlike copyright, which can be protected in a country as long as both that country and the original country are Berne Convention signatories, trademark often requires registration of the particular mark in the country in which protection is sought.[132] For this section, the paper will assume that all of the rights owners in Susan's story have registered the elements in question in both the United States and Japan.

A. United States

The trademark issue in relation to fan fiction is becoming increasingly important, particularly due to slash fiction.[133] Many character owners have expressed concern about slash fiction ruining the reputation of their characters, a claim that is irrelevant in copyright considerations.[134] Since owners that sleep on their rights by not acting when others use their characters can lose the right to bring future cases, an increasing number of rights owners are bringing trademark claims to defend their characters.[135] As with copyright, one must first look at whether elements in fan fiction are protected by trademark, then at whether the fan's use of those elements infringes on the owner's rights.

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132. In the United States, an owner can obtain a common law trademark through use only, but most countries require registration. U.S. Patent and Trademark Office, *Frequently Asked Questions about Trademarks*, http://www.uspto.gov/faq/trademarks.jsp#_Toc275426680 (last modified Apr. 23, 2013). International applications are now available through the Madrid Protocol, but owners still have to choose in which countries their marks are valid—they do not have a "global" registration. Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, June 27, 1989, World Intellectual Property Organization, *available at* http://www.wipo.int/wipolex/en/wipo_treaties/text.jsp?file_id=283484. *See* Natalie Hanlon-Leh, Kathleen S. Herbert & Adam Lindquist Scoville, *A Brand New World: International Trademark Registration and the Madrid Protocol*, 32 COLO. LAW. 89 (2003).

133. McCardle, *supra* note 7, at 464.

134. *Id.*

135. Helfand, *supra* note 80, at 626-27. *See, e.g.*, Conan Props., Inc. v. Conans Pizza, Inc., 752 F.2d 145 (5th Cir. 1985) (regarding the owner of trademark of fictional character "Conan the Barbarian" who brought an action against restaurant alleging infringement of its trademark); Fleischer Studios, Inc. v. A.V.E.L.A. Inc., 772 F. Supp.2d 1155 (C.D. Cal. 2009) (bringing of an action by a studio against licensor over use of "Betty Boop" cartoon character); DC Comics v. Kryptonite Corp., 336 F.Supp.2d 324 (S.D.N.Y. 2004) (regarding the comic book publisher suit against manufacturer of bicycle locks, claiming trademark ownership of the term "kryptonite").

1. Is the Element Protected by Trademark?

The Lanham Act, the federal trademark statute in the United States, defines a trademark as "any word, name, symbol, or device, or any combination thereof— . . . used . . . to identify and distinguish" the goods or services of one person from those of another, even if the source is unknown.[136] Therefore, the story from which a fan writer copies is not protected by trademark, but elements within the story, such as characters, phrases, titles, or places can be.[137]

If elements are inherently distinctive, they can become a trademark. Inherently distinctive marks make consumers regard those particular symbols as an indication of the producer.[138] To date, no court has found a fictional character to be inherently distinctive and the case law indicates that no character ever could be.[139] Therefore, rights owners must show acquired distinctiveness or secondary distinctiveness to receive trademark protection for elements of their works.[140] Unlike inherent distinctiveness, secondary distinctiveness "requires actual use of the mark for a period of time sufficient to create public recognition."[141] For the characters in Susan's story—Dumbledore, Gandalf, Captain Kirk, and Professor X—continuous actual use by their owners as well as their fame likely fulfill this first requirement of trademark protection.

However, being famous and used is not enough to receive trademark protection. The element also must serve "as an indicator of source."[142] Courts have generally stated that a mark must indicate only a *single* source of goods.[143] However, this is a practical impossibility for fictional characters.[144] Take Dumbledore as an example—while many would attribute Dumbledore to J.K. Rowling, he is also the intellectual property of Warner Brothers, Bloomsbury Publishing, and Scholastic.[145] This is not an unusual situation for fictional characters. While initial court cases determined this prevented characters from being valid trademarks,[146] modern courts have recognized that the identification of

136. 15 U.S.C. § 1127 (2014).

137. *Id.*; Helfand, *supra* note 80, at 627.

138. Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 211-13 (2000); Foley, *supra* note 73, at 940-41.

139. Foley, *supra* note 73, at 942.

140. *Id.* at 940.

141. *Id.* at 941.

142. 15 U.S.C. § 1127; Foley, *supra* note 73, at 942. *See also Ex parte* Carter Publ'ns, 92 U.S.P.Q. (BNA) 251 (Dec. Comm'r Pat. 1952); Pillsbury Co. v. Milky Way Prods., 8 Media L. Rep. (BNA) 1016 (N.D. Ga. 1981); Helfand, *supra* note 80, at 636.

143. Foley, *supra* note 73, at 942. *See, e.g.*, Universal City Studios, Inc. v. Nintendo Co., 746 F.2d 112 (2d Cir. 1984).

144. Foley, *supra* note 73, at 942-43.

145. Daniel Goldblatt, *Warner Bros. and J.K. Rowling Team Up for New 'Harry Potter'-Themed Film Series*, VARIETY (Sept. 12, 2013), http://variety.com/2013/film/news/harry-potter-jk-rowling-warner-bros-1200608921/; *Harry Potter*, BLOOMSBURY, http://harrypotter.bloomsbury.com (last visited May 15, 2014); *Harry Potter*, SCHOLASTIC, http://harrypotter.scholastic.com (last visited May 15, 2014).

146. Frederick Warne & Co. v. Book Sales Inc., 481 F. Supp. 1191, 1197 (S.D.N.Y. 1979).

a single source is "often no more than a convenient fiction"[147] and allow trademark protection of characters anyway.[148]

Based on these elements, most characters and even some locations, such as the Leaky Cauldron or the Starship Enterprise, are protected by trademark. Therefore, Susan has used trademarks in her story.

2. Does the Fan's Use of the Trademarked Element Infringe the Owner's Rights?

Trademark guarantees rights owners a "limited monopoly" over the use of a properly trademarked element.[149] However, this monopoly does not guarantee an owner control over every instance in which its image is affected negatively.[150] It does protect owners from situations in which the use of a mark is likely to cause confusion as to the "origin, sponsorship, or approval of . . . goods, services, or commercial activities."[151] To determine whether consumers are likely to be confused or misled by the fan use, courts typically balance a number of factors.[152] In character trademark cases, many courts ignored the balancing of factors entirely and just looked at the fame of the character.[153] The assumption courts use to justify this method is that with famous characters, "consumers are likely to believe that the creators of the first work created, or at the very least, authorized the second work."[154] In cases with less well-known characters, courts are unlikely to find trademark infringement.[155] Courts have justified this dichotomy by explaining that rampant licensing of well-known fictional characters has created a public expectation that by displaying elements of a fictional character, the person using the character has at least received permission from the owner.[156]

Therefore, even though most consumers of fan fiction would understand that the owners of the characters or locations did not concede to the fan's use of their intellectual property, the current case law implies that courts might find fan fiction infringes trademark anyway, simply because the characters used are well-known.

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147. Foley, *supra* note 73, at 942-43 (citing Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 485 (1986)).

148. Foley, *supra* note 73, at 944; Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 443-44. *See, e.g.*, Edgar Rice Burroughs, Inc. v. Manns Theatres, 195 U.S.P.Q. (BNA) 159, 162 (C.D. Cal. 1976).

149. Foley, *supra* note 73, at 939.

150. Lee, *supra* note 13, at 184.

151. 15 U.S.C. § 1125(a)(1)(A) (2014); Foley, *supra* note 73, at 940.

152. Helfand, *supra* note 80, at 636-37.

153. Foley, *supra* note 73, at 947 (citing Prouty v. Nat'l Broad. Co., 26 F. Supp. 265, 265-66 (D. Mass. 1939)).

154. *Id.*; Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 489 (1986). *See* Lone Ranger Inc. v. Cox, 124 F.2d 650, 652 (4th Cir. 1942); DC Comics, Inc. v. Unlimited Monkey Bus., 598 F. Supp. 110, 115-16 (N.D. Ga. 1984).

155. Foley, *supra* note 73, at 947. *See* DeCosta v. Columbia Broad. Sys., Inc., 520 F.2d 499, 514-15 (1st Cir. 1975).

156. Foley, *supra* note 73, at 949. *See* Conan Props., Inc. v. Conans Pizza, Inc., 752 F.2d 145, 150 (5th Cir. 1985); Warner Bros., Inc. v. Gay Toys, Inc., 658 F.2d 76, 79 (2d Cir. 1981).

If courts follow this process, Susan is unquestionably liable for trademark infringement for all of the characters and protectable elements in her story.

Even when courts do not find trademark infringement, owners may still have a dilution claim. Dilution claims "can lie even where copyright law would allow a depiction of a character under fair use and no trademark violation exists because consumers are not confused as to source,"[157] making it the ideal tool for owners who would like to stop particular "offensive" types of fan fiction. A dilution claim can take one of two forms: "[t]he first is a 'blurring' or 'whittling down' of the distinctiveness of the mark" and "[t]he second is a "tarnishment" of the mark."[158] The second, tarnishment, is most likely to be claimed by owners in fan fiction cases. Tarnishment occurs "when a defendant uses the mark in a way that 'creates an undesirable, unwholesome or unsavory mental association' with the mark."[159] In fan fiction, owners claiming tarnishment are most likely to target slash fiction or pornographic fan fiction.

However, "[a] court will entertain a claim for tarnishment or dilution only when the defendant's use of the mark is in a commercial setting."[160] This would mean that *doujinshi* is considered unfavorable to the original artist and might be liable for a dilution claim, but most free fan fiction would not. Even though this claim initially seems ideal for owners, it is ultimately a legal dead end for most owners seeking to pursue a suit against fan-writers.

3. Are there any Defenses to a Trademark Claim that Fans can Use?

While trademark does have fair use defenses, they are not applicable to fan fiction.[161] However, the First Amendment also allows individuals to claim it as a defense to unauthorized trademark use when the use is not purely commercial. The test for this defense (the *Rogers* test) determines whether (1) there is some artistic relevance to the use of the trademark and (2) the use of the trademark is explicitly misleading as to the source of the work.[162] Art and parodies often fall into these categories,[163] as would non-commercial fan fictions. Commercial fan fiction would not meet the threshold requirement for this defense of a work that is "not purely commercial."

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157. Helfand, *supra* note 80, at 639.

158. McCardle, *supra* note 7, at 465 (citing Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031, 1039 (N.D. Ga. 1986)).

159. *Id.*

160. *Id.* (citing L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 29 (1st Cir. 1987)).

161. Statutory fair use, defined in Lanham Act § 33(b)(4), is when one uses a mark only in its descriptive sense and not as a trademark (e.g. John is a *super man*.). Nominative fair use is a common law defense that allows people to use a mark when talking about someone else's product (e.g. "*Superman* grosses $1 billion" as a newspaper headline). *See* New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302 (9th Cir. 1992). Both of these are complete defenses to trademark, but neither is really applicable to fan fiction, as it relates to the fan's new product.

162. Rogers v. Grimaldi, 875 F.2d 994, 999 (2nd Cir. 1989); E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1099 (9th Cir. 2008).

163. *See, e.g.*, Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc., 886 F.2d 490 (2nd Cir. 1989); Mattel Inc., v. Walking Mtn. Productions, 353 F.3d 792 (9th Cir. 2003).

In fan fiction, it should be easy for fan authors to argue that they meet the first part of the *Rogers* test. Using trademarked characters in a piece of fan fiction that reimagines the original work or critiques the original work does have artistic relevance. The second part of the test may be more difficult. While works on a site such as fanfiction.net are unlikely to make anyone think that they were written by the original author, stand-alone works of fan fiction might explicitly mislead others. If a short story describing Dumbledore's exploits before the days of Harry Potter were to be sold on a website, or even made available without being attached to a fan fiction site, eager readers may be misled to believe that J.K. Rowling herself wrote this work. In this instance, the First Amendment defense would be unavailable to the fan author.

To avoid explicitly misleading their audience, many fan authors include a disclaimer at the beginning of their fan fiction that their work is purely fan work and was neither written nor authorized by the owner.[164] While these disclaimers are not legally binding, they would negate consumer confusion, making an infringement claim more difficult for owners. This may not help if courts continue to assume that any use of a famous character infringes upon an owner's trademark, but it cannot hurt fans to continue to use such disclaimers.

The only other real defense to a trademark claim is abandonment. Trademark owners can perpetually renew trademarks as long as they are used.[165] However, once use of the trademark stops, trademark law no longer protects the element.[166] This is generally an unhelpful defense in fan fiction, though—most fan fiction is about current popular culture in which the owner renews its trademark rights. Moreover, as a practical matter, an owner that has abandoned its trademark is unlikely to bring an infringement claim.

B. Japan

As in the United States, the Japanese Trademark Act protects elements registered in the country. However, the existing law is fairly unclear on what would happen in a fan fiction trademark case.

1. Is the Element Protected by Trademark?

In Japan, "any character(s), figure(s), sign(s) or three-dimensional shape(s), or any combination thereof, or any combination thereof with colors" may be a valid mark if it is "used in connection with the goods [or services] of a person who produces, certifies or assigns the goods [or services] as a business."[167] These marks may be registered based on use or, with otherwise generic marks, when "consumers are able to recognize the goods and services as those pertaining to a

164. Lee, *supra* note 13, at 184.

165. 15 U.S.C. § 1058 (2012); Foley, *supra* note 73, at 939.

166. Helfand, *supra* note 80, at 646-47.

167. Shōhyō-hō, [Trademark Act], Act No. 127 of 1959, art. 2(1) (Japan).

business of a particular person."[168] In that sense, obtaining a trademark in Japan is easier than in the United States.

Whether characters can be trademarked in Japan remains unclear (the word "character" in the trademark act is understood to refer to Japanese characters, such as Kanji, not animated characters from fictional works). It appears that no cases have been decided on the matter and no articles have discussed it. However, based on the language of the Trademark Act and its similarity to the U.S. Trademark Act, as well as the extensive use and popularity of manga and anime characters, it seems unlikely that Japan would forbid the trademark of fictional characters. The only potential complication is that the Trademark Act does not list "words" or "names" as protected marks, but those could be included as "characters" or "signs." Therefore, animated characters or pictorial representations of characters may be capable of being trademarked, but descriptions, names, and other literary representations might not be protected by trademark. This may pose a key problem to obtaining trademark protection in Japan for owners.

2. Does the Fan's Use of the Trademarked Element Infringe the Owners' Rights?

The effective registration of a trademark in Japan gives owners the same rights as holding a trademark in the United States—the owner can prevent infringement and dilution. An owner has the exclusive right to use that mark in connection with the designated goods or services.[169] That exclusive right includes the request to affix an indication to marks that would cause confusion.[170] This "request" provision is a reflection of the non-litigious Japanese society and reiterates the idea that adding a disclaimer to fan fiction may prevent trademark liability for the fan in Japan.

Acts that constitute infringement of the trademark are enumerated in Article 37 of the Japanese Trademark Act. The infringing uses most applicable to fan fiction are:

> the possession of products indicating the registered trademark . . . for the purpose of using the registered trademark . . . in connection with the designated goods or designated services, or goods or services similar thereto [and] the manufacture or importation of products indicating the registered trademark . . . for the purpose of using or causing to be used the registered trademark . . . in connection with the designated goods or designated services or goods or services similar thereto.[171]

If fan fiction itself were a "product," downloading or writing fan fiction with someone else's trademarked elements would infringe the owner's trademark rights without needing to show fame or indication of source. Based on these articles, it

168. *Id.* art. 3(2).
169. *Id.* art. 25.
170. *Id.* art. 24-4.
171. *Id.* art. 37(v), (vii).

would be much easier for an owner to show trademark infringement under Japanese law than U.S. law.

Dilution in Japanese trademark law is more complicated. Currently, the Japanese judiciary and legislature are at odds with each other; so despite Japanese statutes not recognizing dilution per se, Japanese courts have found dilution to be present, essentially making judge-made law in a civil law country where that should not be possible.[172]

One other possibility for an owner seeking a remedy in Japan is an unfair competition claim. Fame is a key aspect in Japan's unfair competition law. The Unfair Competition Prevention Act determines that 'unfair competition' means:

> the act of using the Goods or other Appellations . . . which is identical with, or similar to, another party's Goods or Other Appellation that is well-known among the consumers, . . . and causes confusion with the goods or business of that other party's [or] the act of using Goods or Other Appellations of another that are identical with, or similar to, another person's famous Goods or Other Appellations. . . .[173]

"Goods or Other Appellations" are "name[s] connected with a person's business, trade name, trademark, mark, the container or package of goods, or any other appellation of goods or businesses."[174] This provision looks similar to how the U.S. courts have dealt with trademark infringement of characters—if the owner can show fame, the fan is liable for unfair competition. Fame here generally requires nationwide fame,[175] but that would be simple to prove for characters such as Dumbledore and Gandalf. Therefore, fans like Susan may be liable for unfair competition in Japan simply by using an owner's trademarked character in their stories.

With trademark, then, it would be more difficult for owners to decide where to bring suit. While the United States boasts greater protection for famous characters and while Japan has no discernable protection for characters, non-commercial uses would be more difficult to recover from in the United States, while simple use could be used to find a fan liable in Japan. Owners might simply decide to pursue the case in the United States, with a friendlier court system for rights owners, than risk not having a protectable character in Japan. Of course, since marks must be registered to bring suit, the protectability of characters is something an owner would know long before fan fiction cases come to pass.

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172. Kenneth L. Port, *Trademark Dilution in Japan*, 4 NW. J. TECH. & INTELL. PROP. 228, 230 (2006).

173. Port, *supra* note 172, at 229 (citing Fusei kyoso boshibo [Unfair Competition Prevention Act], Law No. 47 of 1993, art. 2-1).

174. *Id.*

175. *Id.* at 235.

VI. MORAL RIGHTS AND FAN FICTION

If copyright and trademark are an owner's economic protections, moral rights are an author's artistic protections. Moral rights do not protect all of the owners in the same way that other intellectual property rights do; instead, moral rights only protect the original author of the work. Therefore, J.K. Rowling can bring a moral rights claim against Susan for her use of Dumbledore, but Warner Brothers or Bloomberg cannot.

Moral rights exist because of the idea that "[t]he creation of an artistic work is not merely a product that can be bought or sold but, rather, is a direct embodiment of the author's personality, identity, and even her 'creative soul.'"[176] Practically speaking, moral rights allow authors to object to how their works are used once the works leave their hands.

Moral rights are internationally recognized and protected. The Berne Convention recognizes the right of the author "to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[177] These rights, typically called the right of attribution and the right of integrity respectively, remain with the author even after the transfer of economic rights and persist after his death.[178]

Theoretically, all members of the World Trade Organization and all signatories to the Berne Convention should abide by these moral rights. However, the United States managed to draft the final version of TRIPs to exclude Article 6bis from the adherence requirement,[179] so U.S. law still does not recognize moral rights, despite most nations going above and beyond TRIPs.[180] The United States claims it still protects moral rights in various ways,[181] but likely not to the satisfaction of authors who are not pleased by fan fiction.

A. United States

The moral rights provision of the Berne Convention contributed to the United States' long avoidance of becoming a member.[182] Once the United States became a member, its Congress determined that it would require specific legislative enactments to become law, thereby avoiding establishing formal moral rights obligations.[183] Yet the United States claims that it still recognizes moral rights

176. Bird & Ponte, *supra* note 17, at 217 (citing Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 801 (2001)).

177. Berne Conv., *supra* note 51, art. 6bis(1).

178. *Id.* art. 6bis(2); Bird & Ponte, *supra* note 17, at 224.

179. Monica Kilian, *A Hollow Victory for the Common Law? Trips and the Moral Rights Exclusion*, 2 J. MARSHALL REV. INTELL. PROP. L. 321, 321 (2003) (citing Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1867 U.N.T.S. 154).

180. Kilian, *supra* note 179, at 321-22.

181. Bird & Ponte, *supra* note 17, at 252 (citing 134 CONG. REC. S10320-10326, 10323 (daily ed. May 10, 1988) (statement of Sen. Kastenmeier), 142 Cong Rec S 10320, at *S10,323 (LEXIS)).

182. *Id.* at 248.

183. *Id.* at 251.

under other property and economic rights or under state tort law.[184] However, "[e]fforts to address moral rights issues through statutes, such as the Lanham Act, and alternative legal theories, such as defamation, unfair competition, and invasion of privacy, were often shot down in the courts, blocking meaningful judicial recognition and protection of moral rights."[185]

Some courts recognize moral rights through "American analogues."[186] Often, this depends on state law. At least fourteen states have some sort of moral rights protection, often those of integrity and attribution that are included in the Berne Convention.[187] State property and contract law also include some implicit moral rights. Gunlicks points out that an author has an absolute property right until he or she chooses to part with it.[188] While this is true, it undermines the basic tenets of U.S. intellectual property law—that creative works should be encouraged so that they may be available to the public.[189] If authors choose not to publish works out of fear of mutilation or misattribution, the intellectual property laws are not fulfilling their function.

Arguably, contract law is the ideal place to preserve an author's moral rights. However, the inalienability of moral rights generally contradicts the notions supporting freedom of contract.[190] Yet freedom of contract also allows authors to preserve their moral rights; "'there exists an implied covenant of good faith and fair dealing'" in every contract, meaning that a party must refrain from actions that harm or destroy the other party, and that unreasonable or unfair use of an author's work would violate the contract in which the author consented to use of the work.[191] Additionally, authors are expected to reserve rights to themselves in contracts if they do not wish for the publisher to have them.[192] While this would theoretically preserve an author's moral rights, not only is this often untrue in practice, where the author is in an inferior bargaining position, it also does not bind the fan, only the publisher. Therefore, in the United States, the fan can create fan

184. *Id.* at 252 (citing 134 CONG. REC. S10320-10326, 10323 (daily ed. May 10, 1988) (statement of Sen. Kastenmeier), 142 Cong Rec S 10320, at *S10, 323 (LEXIS)).

185. *Id.* at 253-54 (internal citations omitted). *See also* Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 25-27 (1985).

186. Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH & LEE L. REV. 795, 805-06 (2001).

187. Bird & Ponte, *supra* note 17, at 254-55 (providing the corresponding state statutes as: Cal. Civ. Code §§ 980-90 (2014); Conn. Gen. Stat. § 42-116 (2014); 815 Ill. Comp. Stat. 320/1-8 (2014); La. Rev. Stat. Ann. § 51:2151-56 (2014); Me. Rev. Stat. Am. Tit. 27. §§ 303(1)-(5) (2014); Mass Gen. Laws Ann. ch. 231, § 85S (West 2006); Nev. Rev. Stat. Ann. §§ 597.720-60 (2014); N.J Stat. Ann. § 2A:24A1-8 (West 2006); N.M Stat. Ann. §§ 13-4B1 to -3 (2006); NY Arts & Cult. Aff. Law §§ 11.01-14, 13.01-13.19 (Consol. 2006); 73 Pa. Cons. Stat. §§ 2101-10 (2014); RI Gen. Laws §§ 5-62-2 to -12 (2014); S.D. Codified Laws § 1-22-16 (2014); Utah Code Ann. § 9-6-409 (2014)).

188. Gunlicks, *supra* note 60, at 619.

189. Bird & Ponte, *supra* note 17, at 248.

190. Kilian, *supra* note 179, at 325.

191. Gunlicks, *supra* note 60, at 618 (quoting Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163, 167 (N.Y. 1933)).

192. Kilian, *supra* note 179, at 328 (quoting Lee, *supra* note 184, at 813); Gunlicks, *supra* note 60, at 634.

fiction that alters the author's work, sometimes directly contrary to the author's wishes, and if no copyright or trademark exists, the author is out of luck.

B. Japan

Civil law nations typically protect both economic intellectual property rights and moral or personal rights.[193] Japan is no exception. Japan protects three rights: the right of divulgence, the right of authorship, and the right of integrity.[194]

The right of divulgence encompasses "the right to control if and when a work is made public."[195] It encompasses the idea "that only the creator of the work knows when the work is complete and therefore ready to be . . . reviewed by the public."[196] This helps protect authors from publishers pushing publication before the author is ready. While important, it has less applicability to fan fiction.

The right of authorship is similar to the right of attribution in the Berne Convention. It is "[t]he right to determine whether to disclose the name of the author, to include an author's name on his work, to exclude the name of one not an author, and to determine whether any name disclosed should be a true name or a pseudonym."[197] The right of authorship also requires that derivative works must indicate the name of the original author.[198] Authors could have a claim against fans when they write fan fiction that does not appropriately attribute the characters to the author, but most fan fictions are very explicit about giving the authors credit, so this claim is unlikely to arise.

The right of integrity is the most applicable to fan fiction. The right of integrity includes "[t]he right to control distortions, mutilations and modifications of the work."[199] This has been read to mean "that any unauthorized change to an author's work is an infringement of the author's right to integrity."[200] As Japan does not have fair use protections, this means that any sort of transformation of a work, even if for non-commercial or parody purposes, would violate the author's right to integrity.

193. Bird & Ponte, *supra* note 17, at 213-14 (citing Monica E. Antezana, Note, *The European Union Internet Copyright Directive as Even More than it Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory*, 26 B.C. INT'L & COMP. L. REV. 415, 421-22 (2003)).

194. Japanese Copyright Law, *supra* note 116, arts. 18-20.

195. Scott, *supra* note 58, at 340 (citing Japanese Copyright Law, *supra* note 116, art. 18).

196. Bird & Ponte, *supra* note 17, at 220.

197. Scott, *supra* note 58, at 340 (citing Japanese Copyright Law, *supra* note 116, art. 19).

198. Foster, *supra* note 43, at 337 (citing JAPANESE COPYRIGHT LAW: WRITINGS IN HONOUR OF GERHARD SCHRICKER 45 (Peter Ganea, Christopher Heath & Hiroshi Saitô eds., 2005)).

199. Scott, *supra* note 58, at 340 (citing Japanese Copyright Law, *supra* note 117, art. 20).

200. Foster, *supra* note 43, at 337-38 (citing JAPANESE COPYRIGHT LAW: WRITINGS IN HONOUR OF GERHARD SCHRICKER 46 (Peter Ganea, Christopher Heath & Hiroshi Saitô eds., 2005)).

The Japanese Supreme Court in the Mad Amano case has supported this conclusion.[201] In that case, an artist called Mad Amano used another artist's photograph of skiers on an alpine slope to create a parody of the work.[202] The Supreme Court decided that Mad Amano's work was a modification of the original photograph, infringing the author's moral right of integrity.[203] The Court clarified that if Mad Amano had merely "quoted" the artist's photo, where his new work was the major part and the original work was only a minor part, it might be permitted, but in this case, change was not enough as the photo was the major part and its "essential characteristics" were still evident.[204]

Based on the Mad Amano case, if authors wanted to sue fan writers for fan fiction, they could do so under the right of integrity and likely prevail. Susan's work might be considered a "quote" by the Japanese Supreme Court, with her borrowed characters only a minor part of her overall work. If this were the case, she would be free from liability under the Mad Amano case. However, the more likely outcome is that a Court would decide that because she used the "essential characteristics" of each of the characters, her fan fiction is a violation of the right of integrity under Japanese law.

Therefore, if an author wanted to sue fans for their fan fiction, Japan would be the preferable venue, if only for the ability to find infringement of the author's moral rights.

VII. CONCLUSIONS

If J.K. Rowling wanted to sue Susan, where could and should she go? As mentioned in Section III, she must first have an existing right in the applicable law. If she has registered copyrights and trademarks in both Japan and the United States, either is appropriate. Next, it gets complicated, as Susan is in Japan, but published her fan fiction on fanfiction.net, where it has been read in both the United States and Japan. In this case, Rowling is free to choose between the two countries because infringement has taken place in both.

Now that Rowling must make a decision, the cultural and legal comparisons between the two countries play an important role. Culturally, Rowling would probably prefer to bring suit in the United States, where she could recover more money or get a more assured injunction and where the stigma against litigation would not be present. However, if suing for copyright infringement, Rowling

201. *Id.* at 333-35 (citing Saiko Saibansho [Sup. Ct.] Mar. 28, 1980, Sho 54 (o) no. 923, 415 Hanrei Tainmuzu [Hanta] 100, *available at* http://www.courts.go.jp/hanrei/pdf/js_20100319121451062181.pdf (Japan) [hereinafter The Mad Amano Case]; Tokyo Koto Saibansho [Tokyo High Ct.] May 19, 1976, Sho 47 (ne) no. 2816, 226 Hanrei Taimuzu [Hanta] 194, *available at* http://www.courts.go.jp/hanrei/pdf/BA4D7DCD0AC151CE49256A76002F89AE.pdf (Japan); Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Nov. 20, 1972, Sho 46 (wa) no. 273, 289 Hanrei Taimuzu [Hanta] 77, *available at* http://www.courts.go.jp/hanrei/pdf/7805A1DAB05D83AC49256A76002F8A63.pdf (Japan)).

202. Foster, *supra* note 43, at 333 (citing The Mad Amano Case, *supra* note 198).

203. *Id.* at 335 (citing The Mad Amano Case, *supra* note 198).

204. *Id.* at 335 (quoting The Mad Amano Case, *supra* note 198).

would prefer Japan, where a fair use defense would not prevent her from winning the suit. On the other hand, if suing for trademark infringement (assuming she had a registered trademark for Dumbledore and the Leaky Cauldron in both countries), she may have no preference, as character infringement in the United States is as easy to find as unfair competition in Japan. Finally, if wanting to allege an infringement of her moral rights, Rowling would also prefer to bring the suit in Japan, where moral rights not only exist, but also are strong enough that any alteration is sufficient to find infringement. Perhaps it is this set of contradictory circumstances and the lack of guarantee as to where infringement has taken place over the internet that helps contribute to a lack of fan fiction lawsuits.

Practically, fan fiction puts owners and fans alike in a difficult situation. While many owners would prefer not to alienate their fans and appreciate the publicity, they would also like to control the images of their characters, deciding with whom they are in relationships, whether they drink or smoke, and even the types of clothes they wear. Various solutions could make this situation easier on both parties.

First, the U.S. Congress and Japanese Diet could amend their intellectual property acts to clarify their national legal positions on fan fiction. Professor Tushnet recommends that the law draw lines that resemble current norms,[205] but even law that would clarify small issues such as whether characters receive protection, the extent of moral rights, or whether non-commercial fan fiction or *doujinshi* are permitted uses would help.

Second, TRIPs or the Berne Convention could deal with fan fiction. While this is a much heavier burden and much more difficult to coordinate, an international agreement might be the best way to coordinate between fair use protections on one hand and strong moral rights on the other. States like the United States and Japan, which have one but not the other, are unlikely to effectively make a decision about the appropriate way to balance these two concepts.

Third, owners could coordinate to authorize particular types of fan fictions but not others. The Japanese anime and manga industries already support *doujinshi*, and many American studios, such as Paramount, allow inoffensive fan works. While many owners are moving in this direction, it seems unlikely to get the consent of some of the stricter holdouts, such as Anne Rice. Additionally, different owners may have different ideas about what is "inoffensive"—while all owners are likely in agreement that commercial fan fiction is undesirable, different owners probably have different perceptions about slash fiction or pornographic fan fiction.

Based on all of this, the ultimate question should be whether it matters. Should Susan stop writing her fan stories if Rowling can sue her and win in either the United States or Japan under certain laws? No. The practical matter is, as long as Susan is not trying to sell her works, Rowling likely will not do that. Should

205. Tushnet, *supra* note 20, at 654.

Rowling start going after fans that write distasteful stories about her characters? No—she does not want to isolate her fans. Will existing suits move over to Japan, as the laws are more favorable to intellectual property rights owners there? That depends. If owners move over to Japan, there is a chance that the culture surrounding lawsuits will change. On the other hand, the culture may dissuade owners from doing so, meaning no lawsuits will occur.

Ultimately, intellectual property is becoming less territorial and more international. Fan fiction and similar fan works are only increasing and it would be best for the law to move with them rather than fight against them. To do this, international conversations need to be had in order to create international solutions, so fans can continue to elaborate on the characters they love without hurting the ones who created them.